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Supreme Court, U.S.
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In The

Supreme Court of the United States

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

On Petition For Writ Of Certiorari To The Vermont Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court can escape the constitutional analysis and parental rights presumption required by *Troxel v. Granville*, 530 U.S. 57 (2000), before awarding a third party parentage rights over the objections of a fit, biological parent by simply treating the non-adoptive, non-biological third party as a *de facto* parent where said third party had only minimal contact with the child of the fit, biological parent and where there is no allegation of harm to the child.

2. Whether a court may create new law regarding parentage rights and apply it retroactively to interfere with a fit, biological parent who objects to parentage rights being awarded to a non-adoptive, non-biological third-party without ever considering the fundamental right and presumption in favor of parents recognized for more than 100 years by this Court and affirmed in *Troxel v. Granville*, 530 U.S. 57 (2000).

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OPINIONS BELOW

The most recent decision of the Vermont Supreme Court following the trial is unreported. (App. 1a-5a). The prior decision of the Vermont Supreme Court on the interlocutory appeal is available at *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951(Vt. 2006). (App. 6a-64a). The Vermont family court's "Temporary Order Re: Parental Rights & Responsibilities" is unreported. (App. 68a-72a). The Vermont family court order declaring Respondent a parent to Petitioner's biological child is unreported. (App.73a-96a).

JURISDICTION

The opinion of the Vermont Supreme Court was filed on March 14, 2008.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

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[1] On June 2, 2008, Justice Ginsburg granted Petitioner's application for an extension of time within which to file a petition for writ of certiorari, extending the time to and including August 11, 2008.

CONSTITUTIONAL PROVISION INVOLVED

This case raises issues involving Section one of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

This case concerns the fundamental right of Petitioner, Lisa Miller ("Lisa"), the fit, biological mother of six year old Isabella ("IM"), to decide whether Respondent, Janet Jenkins ("Janet"), a woman who has no biological or adoptive relationship to IM should be declared IM's parent over the objections of Lisa.

The parties have engaged in litigation in various courts of Vermont and Virginia for approximately five years. Although the litigation history is complicated, the facts are quite simple. Through assisted reproductive technology, Lisa gave birth to IM in Virginia while Lisa and Janet were in a same-sex relationship. Janet sought to be declared IM's parent and sought custody and visitation with IM. Lisa has objected in every court to any order granting Janet visitation, custody or any other parental rights as a violation of her fundamental constitutional rights as a fit parent.

Lisa and Janet were residents of Virginia since childhood and lived together in Virginia in the late 1990s. In December 2000, while Virginia residents, they traveled to Vermont to obtain a Vermont Certificate of Civil Union and immediately returned to Virginia without any change in domicile. (*See* App. 79a-80a). In 2001, Lisa was artificially inseminated in Virginia, by a Virginia doctor,

with sperm from an anonymous donor. (*See* App. 80a). Janet did not provide any genetic material for the insemination and has no biological connection to IM. (*See* App. 81a).

Lisa gave birth to IM in Virginia on April 16, 2002 and is the sole parent listed on IM's Virginia birth certificate. (*See* App. 80a-81a). In August 2002, Lisa, Janet and IM moved to Vermont. (*See* App. 81a). Although Vermont law permitted same-sex adoption, Janet never petitioned to adopt IM. (*See* App. 82a). When the relationship ended thirteen months later, in September 2003, Lisa returned to her home in Virginia with IM. (See App. 81a). Janet continued to reside in Vermont. (*Id.*)

Wanting to dissolve her civil union, in November 2003, without assistance of counsel and with directions from the clerk of court's office personnel, Lisa *pro se* filed forms in Vermont to commence the dissolution proceedings. (*See* App. 74a). Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid. Virginia law, then and now, prohibited such same sex-relationships. The *pro se* complaint form asked whether there were "biological or adoptive children of said civil union." Lisa, who gave birth to IM during the civil union, listed IM in response

to that question.[2] Janet counterclaimed, seeking full custody of Lisa's biological child, without any allegation that Lisa was an unfit mother. (*See* App. 75a).

On June 17, 2004, the Vermont family court entered a "Temporary Order Re: Parental Rights & Responsibilities." (App. 68a). Over Lisa's objections, and without deciding whether Janet was a parent to IM, the court temporarily awarded Lisa "legal and physical responsibility" of her child, but

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[2] It is unimaginable that checked boxes on standardized forms filed by a *pro se* plaintiff would be treated as presumptive evidence that Lisa knowingly waived her parental right to direct the upbringing of her child. *See Johnson v. Zerbst*, 304 U.S. 458-59 (1938) (Courts must indulge every reasonable presumption against waiver of fundamental rights and must ordinarily find an intention to relinquish or abandon a known right.); *Brady v. United States*, 397 U.S. 742, 748 (1970) (Knowing waiver requires a person to intelligently appreciate the legal consequences of waiver by being sufficiently aware of the relevant circumstances and likely consequences.). Lisa did not waive her parental rights. The statement was meant to be merely descriptive, namely that Lisa's child was born during the time the civil union was in effect.

granted Janet temporary "parent child contact." (*See* App. 68a-70a). Lisa was ordered to give Janet one week each month of unsupervised visitation with then two-year-old IM in Vermont beginning in August 2004. (*Id.*).

Five months later, the Vermont family court belatedly reached the parentage question and, over Lisa's objections, declared Janet a parent to IM. After explaining that, "Vermont has not yet been presented with the question of parental status concerning a child born during a marriage [or civil union] and conceived through artificial insemination," the court created a new parentage rule and applied it retroactively to Lisa's case. (*See* 88a-90a). In doing so, it focused on the parties' legal connection through a Vermont civil union. It declared that

> where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and to raise the child as one's own as part of a family unit, not by biology.

(App. 90a). The Vermont family court (and later its supreme court) thereby abandoned the pre-existing legal processes for determining parentage in Vermont and disregarded federal constitutional law

protecting a fit parent's rights in favor of this new approach in the context of a civil union dissolution proceeding.

On August 4, 2006, the Vermont Supreme Court affirmed the parentage and visitation determinations in Janet's favor following an interlocutory appeal. (App. 6a). That court summarily rejected Lisa's arguments that an order declaring Janet a parent to Lisa's biological child violates her fundamental parental rights guaranteed by the U.S. Constitution. (App. 51a). It skirted the issue by simply declaring Janet to be a parent to IM and then treating Lisa and Janet as equals for purposes of any constitutional parental rights analysis. (*See* App. 51a).

On remand, the family court treated Lisa's defenses and arguments raising federal parental rights as having been conclusively determined against her. On appeal of the family court's order after trial, the Vermont Supreme Court similarly dispensed with the constitutional parental rights issues using the doctrine of law of the case. (App. 2a-3a).

In July of 2004, Lisa initiated proceedings in Virginia. Those proceedings are the subject of a separate petition for writ of certiorari to be filed shortly with this Court.

Federal Questions Presented in State Proceedings

In a motion filed on July 26, 2004, Lisa first raised the issue of her constitutional parental rights in the Vermont family court. Lisa argued that an order granting parental rights to Janet over Lisa's objections violated Lisa's fundamental rights as a fit, biological parent, as most recently articulated in *Troxel v. Granville*, 530 U.S. 57 (2000). On October 8, 2004, before the family court made any parentage determination and with the court's permission, Lisa briefed the argument that an order declaring Janet a parent would infringe upon Lisa's federal constitutional parental rights. Lisa argued that under the Fourteenth Amendment, she has the exclusive right, as the fit, biological parent, to determine whether to grant visitation to Janet. The Vermont family court did not address that argument in its November 17, 2004 order establishing Janet's parentage. (App. 73a-96a).

Subsequently, three interlocutory orders of the family court were appealed to the Vermont Supreme Court. Relevant here is Lisa's interlocutory appeal of the decision that found Janet and Lisa to be legal parents of IM, and the decision that awarded Janet temporary parent-child contact. Lisa re-asserted her argument that an order declaring Janet a parent to Lisa's biological

child violates her fundamental parental rights.

The Vermont Supreme Court affirmed all three interlocutory orders in an August 4, 2006 opinion. (App. 7a-8a). That court wrongly concluded that Lisa had not raised the parental rights issue in the trial court and ruled that even if she had, the argument was unpersuasive. (*See* App. 51a).

> This argument was not adequately raised below and has been waived. In any event we reject it. Janet was awarded visitation because she is a parent of IM. Lisa's parental rights are not exclusive.

(App. 51a; internal citation omitted). Those four sentences were the extent of the Court's analysis of the federal constitutional claim in the interlocutory appeal. In her motion for reargument, Lisa specifically pointed out how the parental rights claim had been raised below. Even so, the Vermont Supreme Court denied the motion. (App. 65a-66a).

After remand, Lisa filed a Reply and Affirmative Defenses to Janet's Counterclaim seeking custody. Her affirmative defenses again raised her exclusive federal parental rights. After a four-day trial, the family court dissolved the union, divided the property and apportioned parental rights and responsibilities between Lisa and Janet. The court did not address Lisa's arguments on parentage except to note

that the parentage issues had been fully resolved by the Vermont Supreme Court and appeared to be raised solely for the purpose of preservation for appellate review. Similarly, relying on its interlocutory opinion and the doctrine of law of the case, the Vermont Supreme Court declined to address the merits of Lisa argument that the family court's final order violated her fundamental rights by establishing parentage and awarding parent-child contact to a non-biological, non-adoptive person. (App. 2a-3a).

REASONS FOR GRANTING THE WRIT

This petition should be granted to resolve a pervasive split among the states on the scope of parental rights after *Troxel v. Granville*, 530 U.S. 57 (2000). At least eighteen states, including Vermont in the decision below, have judicially appointed third party legal strangers as *de facto* or psychological parents over the objections of fit, biological parents. Conversely, at least thirteen states have reached the opposite conclusion, typically citing *Troxel*. The important question of federal law concerning what rights fit, biological parents have in the face of claims to *parentage rights*, as distinct from visitation rights, by third parties has not been, but should be, settled by this Court.

It bears emphasis that the case presented to this Court is *not* a domestic relations case. Petitioner does not ask this Court to issue a divorce decree, decide custody, or award alimony. Rather, Petitioner asks this Court to clarify existing confusion over the scope of fundamental parental rights and the deference states must accord the wishes of fit parents under the Constitution. Confusion over this issue has embroiled Virginia and Vermont in nearly five years of litigation, most of which could have been avoided with guidance from this Court as to who may claim the fundamental parental rights protected by the U.S. Constitution. Although this case presents an issue of first impression, given the increased number of states treating same-sex unions as marriage, expressly prohibiting recognition of those unions, or declaring third parties *de facto* parents, the federal issues presented are of nationwide significance and urgency.

This case presents one of those "rare instances . . . in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue . . . ." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004); *see also Palmore v. Sidoti*, 466 U.S. 429, 432-34 (1984) (reviewing child custody determination because it raised important federal concerns concerning race discrimination).

I.

A PERVASIVE CONFLICT EXISTS AMONG THE STATES CONCERNING THE PARENTAL RIGHTS OF FIT, BIOLOGICAL PARENTS *VIS A VIS* THIRD PARTIES.

A significant conflict exists among the state courts regarding the fundamental rights of a fit, biological parent to prevent a parentage determination concerning her child in favor of a legal stranger. The Vermont Supreme Court decisions are recent examples of a pervasive split among the states concerning the rights of fit, biological parents. On the one hand, Vermont has sided with courts in at least eighteen states that disregard the fundamental rights of parents in the face of claims to *parentage* rights by third parties, declaring the third parties *de facto* or psychological parents. Vermont, for example, declared Janet a parent to Lisa's child without engaging in any constitutional analysis or affording the biological parent's preference any weight. Rather, after declaring Janet a parent, the Vermont Supreme Court summarily concluded that her constitutional rights were coextensive with Lisa's. (App. 51a).

On the other hand, courts in at least thirteen states have affirmed the rights of fit, biological parents to direct the upbringing of

their children. *See, e.g., Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007)(de facto parent doctrine interferes with a parent's constitutional right to direct the upbringing of her child).

In the past three years alone, appellate courts in at least eighteen states have wrestled with the fundamental rights of parents in third-party custody or visitation cases – fifteen of which involved disputes between same-sex couples.[3]

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[3] *See Elton H. v. Naomi R.*, 119 P.3d 969 (Alaska 2005) (mother and maternal grandmother sought custody over father's objection); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005) (stepparent sought custody over natural parent's objection), *cert. denied*, 546 U.S. 936 (2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (child support obligation imposed against former partner in same-sex relationship); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (lesbian who donated her ova to her partner and later sought custody was determined to be a parent under the UPA); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (biological mother was estopped from attacking the validity of a stipulated judgment that declared both her and her ex-lesbian partner to be parents); *Fish v. Fish*, 939 A.2d 1040 (Conn. 2008) (mother and maternal grandmother sought custody over

father's objection); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. 2005) (transsexual male sought custody over biological mother's objection), *app. denied*, 839 N.E.2d 1037 (Ill. 2005); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (former partner in same-sex relationship sought custody over biological mother's objections); *B.F. v. T.D.*, 194 S.W.3d 310 (Ky. 2006) (former partner in same-sex relationship sought custody over legal parent's objection); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (former same-sex relationship partner sought award of parental rights over objections of biological parent); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008) (former same-sex partner sought custody of child adopted during relationship); *McDermott v. Dougherty*, 869 A.2d 751 (Md. 2005) (maternal grandparents sought custody over objection of adoptive mother's former same-sex partner sought visitation); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (upheld constitutionality of third party visitation statute and affirmed decision granting visitation to *in loco parentis* third party over parental objection); *In re R.A.*, 891 A.2d 546 (N.H. 2005) (mother and grandmother appealed custody award to father); *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. Ct. 2008) (biological parent's former same-sex partner sought custody);

This Court should grant the petition to clarify the rights of fit, biological parents after *Troxel v. Granville*, 530 U.S. 57, 98 (2000) in the face of claims to *parentage* by legal strangers.

For nearly 100 years, this Court has protected a parent's liberty interest in making decisions concerning her child's upbringing. A parent's fundamental right

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Harrold v. Collier, 836 N.E.2d 1165 (Ohio 2005) (maternal grandparents sought custody over father's objection); *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005) (former partner in same-sex relationship sought custody over biological mother's objection); *Peters v. Costello*, 891 A.2d 705 (Pa. 2005) (non-biological grandparents sought custody over father's objection); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007)(former partner in same-sex relationship sought custody over biological mother's objection); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008)(former same-sex partner sought visitation over objection of fit biological mother); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (former same-sex partner sought co-parentage determination over objection of biological mother); *Clifford K. v. Pauls S.*, 619 S.E.2d 138 (W. Va. 2005) (former same-sex partner of biological mother, father and maternal grandfather all sought custody).

has been described as "perhaps the oldest of the fundamental liberty interests." *Troxel*, 530 U.S. at 65. "It is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Commonwealth of Mass.*, 321 U.S. 158, 166 (1944). "The child is not the mere creature of the state . . . ." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Rejecting a claim brought by grandparents seeking visitation with their grandchildren, *Troxel* stated that, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." 530 U.S. at 68-69. Consistent with *Troxel*, in circumstances not involving same-sex civil unions, Vermont refuses to grant third party visitation over the objections of a fit, biological parent. *See Craven v. McCrillis*, 868 A.2d 740, 742-43 (Vt. 2005) (grandmother required to present significant evidence of abuse and neglect before court could substitute its judgment for that of fit father, which judgment is presumed valid).

Here, however, Vermont declared Janet a parent without any inquiry into harm to the

child, Lisa's fitness or Lisa' fundamental parental rights. If a third party visitation order cannot be granted without a showing of harm to the child absent such visitation, a parentage order must be subject to an even more stringent standard. The Vermont orders unconstitutionally interfered with Lisa's decision, as the fit, biological parent, on how to raise her child.[4]

The constitutional violation is manifest given Vermont's creation of a new parentage rule from the bench, which it then applied *retroactively* to Lisa's case. Specifically, in its decision declaring Janet a parent over IM, the trial court explained that no Vermont court had yet addressed the question of how to determine parentage of children born by assisted reproductive technology. (App. 88a-90a). Existing Vermont law, however, did plainly provide that a same-sex partner could be considered a parent but only if she utilized the step-parent adoption process.

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[4] Nor could Janet be characterized as one with whom the child has developed a "substantial relationship." *See Troxel*, 530 U.S. at 98-99 (Kennedy, J., dissenting). Janet and Lisa separated when the child was only seventeen months old. (App. 81a). Janet had sporadic contact with IM until she was two and a half years old, after which Janet has had no contact up to the time of the trial.

Not wanting to wait for a legislative procedure addressing the use of reproductive technology by same-sex couples, the Vermont court held that:

> where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology.[5]

(App. 90a, 44a-45a). In creating this new parentage rule, both the family court and Vermont Supreme Court refused to address Lisa's constitutional parental rights' claim.[6]

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[5] This judicially-created test is much broader than even that offered by the ALI, which provides that before a person can be declared a *de facto* parent, she must have lived with the child for a "significant period of time *not less than two years* . . . ." ALI Principles of the Law of Family Dissolution § 2.03(1)(c) (emphasis added).

[6] What makes this case particularly egregious is the manner in which the Vermont courts flagrantly ignored existing Vermont law and federal constitutional limitations on its actions to reach a desired result. Under existing law, Janet could only be a parent to IM if she had adopted IM. The

court ignored that law, created new law and applied it retroactively to a child *born and conceived in Virginia* and then *residing* with her mother *in Virginia*. Vermont refused to apply its marriage evasion statute equally to civil union couples or properly apply its own choice of law doctrine on validity of unions because, if it had, the civil union would have been declared void *ab initio*. With no civil union to dissolve, the family court would have no dissolution proceeding within which to even entertain Janet's counterclaim for parental rights. In addition, Vermont sidestepped application of the factors for its choice of law doctrine on parentage to instead apply its newly-minted law on parentage rather than the law of the state of the child's birth and residence. Even if the fundamental nature of parental rights were simply procedural, these *ad hoc* and retroactive rules of law constitute a violation of Lisa's parental rights. The process used by Vermont to declare Janet a parent was flawed. By ignoring the settled procedures for determining parentage, Vermont denied Lisa's exclusive parental rights and diminished them. Over the objections of Lisa, the Vermont courts ignored the statutory scheme for determining parentage, together with the legal presumptions about paternity, in favor of a new judicially-created procedure

Appellate courts in Florida, Georgia, Illinois, Iowa, Maryland, Michigan, New Hampshire, New York, Ohio, Tennessee, Texas, Virginia and Utah have held that a nonparent does not obtain custodial rights or decision-making authority simply because the nonparent has strong emotional bonds with the natural parent's child, even where such bonds were encouraged and facilitated

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and applied it retroactively to the parties in this case, affording them no notice of the new standard and no opportunity to have ordered their affairs with an eye to the new law. Compounding the error, Vermont ignored the historical rule (indeed, its own choice of law rule) that would hold the law of the state of birth determines a child's parentage in favor of a new standard that the state with jurisdiction under the Uniform Child Custody Jurisdiction Act automatically has the most significant interest in the case and can use its own laws to determine parentage, even of a child born in another state where the child and her mother were residents. Unsettling historic and settled expectations about the procedure and standards to be used to determine parentage itself infringes upon fundamental parental rights guaranteed by the due process clause of the Fourteenth Amendment.

by the biological parent. *See, e.g.*, *Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (nonparent in same-sex relationship sought parental rights), *rev. denied,* 760 So. 2d 947 (Fla. 2000); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001) (fit biological parent may not lose custody to a nonparent unless nonparent proves by clear and convincing evidence that the biological parent is unfit or that the parental custody would cause physical or significant, long term emotional harm to the child); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (refusing to recognize a psychological parent right even when the nonparent was called "daddy" by the children he had co-parented since birth), *app. denied*, 839 N.E.2d 1037 (Ill. 2005); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999) (former same-sex partner was not entitled to visitation); *Petition of Ash*, 507 N.W.2d 400 (Iowa 1993) (former boyfriend not entitled to visitation with biological mother's child); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008) (overruling prior case law adopting *de facto* parent doctrine and requiring showing of unfitness or other extraordinary circumstances before courts can use best interest of the child standard to overcome objections of biological parent); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (mother's same-sex partner not entitled to visitation or custodial rights over objection of biological father after biological

mother died), *app. denied*, 546 N.W.2d 256 (Mich. 1996); *In re Nelson*, 825 A.2d 501 (N.H. 2003) (rejecting claim by nonparent to parental rights over objection of fit, biological parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (rejecting claim to visitation by former same-sex partner over objection of fit, biological parent); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (rejecting claim that same-sex partner was a parent); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (biological mother's former partner in a same-sex relationship had no claim to visitation); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. Ct. App. 2003) (rejecting claim by same-sex partner for visitation, explaining that the *in loco parentis* status is temporary, ending when the child is no longer under the *in loco parentis* person's care); *Stadter v. Siperko*, 661 S.E.2d 494 (Va. Ct. App. 2008) (refusing to adopt *de facto* or psychological parent doctrine by judicial fiat to allow former same-sex partner to rebut the *Troxel* presumption that favors fit, biological parent); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007)(refusing to extend *in loco parentis* or adopt *de facto* or psychological parent doctrines to permit former same sex partner visitation with child for which she had been appointed a legal guardian during the civil union). *But see Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 508-509 (N.Y. Sup. Ct. 2008) (refusing to follow binding New York precedent, instead finding

biological parent is equitably estopped to deny former same-sex partner has standing to seek custody). Until the decision in the case below, the Vermont Supreme Court had also refused to recognize custodial rights of third-parties who had not adopted the child, *see Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997), or to judicially expand the definition of parent to include alleged psychological parents, *In re J.M.*, 750 A.2d 442 (Vt. 2000).

On the other hand, at least sixteen states grant rights to *de facto* parents, psychological parents, or people who stand *in loco parentis* to the child, over the objection of the child's fit, biological or adoptive parent. These states include Arizona, Arkansas, California, Colorado, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *See, e.g.*, *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004) (without mentioning *Troxel*, allowing one standing *in loco parentis* to obtain visitation over objections of fit, biological parent); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005) (stepparent granted visitation as standing *in loco parentis*), *cert. denied*, 546 U.S. 936 (2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (parental rights and responsibilities granted to former partner in lesbian relationship with biological mother); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (granting former same-

sex partner joint parenting time and decision-making authority over objection of fit, biological mother), *cert. denied*, 2004 WL 2377164 (Colo. 2004), *cert. denied, Clark v. McLeod*, 545 U.S. 1111 (2005); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (woman entitled to some rights of visitation to her former same-sex partner's biological child); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (finding that once a court determines the nonparent in a same-sex relationship to be a *de facto* parent, court is free to award parental rights over objections of biological parent); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (best interest analysis applies when determining custody between biological parent and *de facto* parent), *cert. denied*, 528 U.S. 1005 (1999); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007) (upheld constitutionality of third party visitation statute and affirmed decision granting visitation to *in loco parentis* third party over parental objection); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent stands in parity with biological parent), *cert. denied*, 531 U.S. 926 (2000); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (coparenting agreement between lesbian couple enforceable), *cert. denied*, 827 P.2d 837 (N.M. 1992); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005) (rights of persons standing *in loco parentis* are the same as those of biological parent), *appeal denied*, 890 A.2d 1060 (Pa. 2005); *Rubano v.*

DiCenzo, 759 A.2d 959 (R.I. 2000) (a *de facto* parent has parental rights regardless of *Troxel*); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005) (once court determines third parties to be *de facto* or psychological parents, they are on equal footing with biological parents for purposes of constitutional analysis); *In re Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995) (four factor *de facto* parenthood test), *cert. denied*, 516 U.S. 975 (1995); *Clifford K. v. Paula S.*, 619 S.E.2d 138 (W. Va. 2005) (adopting Wisconsin's *de facto* parent test).

One state, North Carolina, has contradictory rulings from its intermediate appellate courts. *Compare Brewer v. Brewer*, 533 S.E.2d 541 (N.C. Ct. App. 2000) (rejecting claim to *de facto* parent status over objection of fit, biological parent) *with Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008) (finding that biological mother partially relinquished the exclusive right to direct her child's upbringing to her former same-sex partner, requiring the court to decide custody under the best interest of the child analysis).

There are also conflicts among the states as to whether the third party seeking parentage rights over the objections of the fit biological mother must merely demonstrate such a determination is in the best interests of the child or demonstrate that absent such a determination, some actual harm will befall the child's health and welfare. *Compare*

In re Parentage of L.B., 122 P.3d 161, 171-72 (Wash. 2005) (broad equitable powers to act in accord with welfare of the child); *In re Custody of H.S.H.K.*, 533 N.W.2d 419, 440-42 (Wis. 1995) (courts have equitable power to do what is in the best interest of the child) *with Griffin v. Griffin*, 581 S.E.2d 899, 903 (Va. Ct. App. 2003) (absent showing of actual harm to the child, the constitutional liberty interests of fit parents take precedence over the best interests of the child); *Roth v. Weston*, 789 A.2d 431, 450 (Conn. 2002) (denial of visitation must cause real and significant harm to the child); *Clark v. Wade*, 544 S.E.2d 99, 100 (Ga. 2001) (to construe custody statute constitutionally, showing of harm to the child is required). Other states use the amorphous "exceptional circumstances" or "compelling circumstances" as a supposed prerequisite for interfering with the fundamental rights of fit, biological parents. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539, 549 (N.J. 2000) (*de facto* parentage creates exceptional circumstances justifying interference), *cert. denied*, 531 U.S. 926 (2000). There is also conflict amongst the states as to whether such a showing must be by clear and convincing evidence, *see, e.g., Stadter v. Siperko*, 661 S.E.2d 494, 497-98 (Va. Ct. App. 2008); *Clark v. Wade*, 544 S.E.2d 99, 100 (Ga. 2001), or by a preponderance of the evidence, *see, e.g., Hiller v. Fausey*, 904 A.2d 875, 884 & 890 (Pa. 2006); *Moriarty v. Brandt*, 827 A.2d 203,

223 (N.J. 2003), *cert. denied*, 540 U.S. 1177 (2004).

Of course, in the case below, the Vermont court sidestepped the difficult constitutional questions altogether by simply declaring Janet to be a co-equal parent with Lisa. By granting *certiorari*, this Court will have the opportunity not only to correct that error but outline the constitutional thresholds necessary for state family courts to constitutionally award parentage (or parentage rights) to non-biological and non-adoptive persons.

In light of the growing conflict and confusion among the states concerning the parental rights of fit, biological parents *vis a vis* third parties, this Court should address and resolve the conflict.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER
SUPREME COURT OF VERMONT

Lisa MILLER-JENKINS

v.

Janet MILLER-JENKINS.

No. 2007-271.

March Term, 2008.

Appealed from: Rutland Family Court, Docket No. 454-11-03 Rddm; Trial Judge: William D. Cohen.

In the above-entitled cause, the Clerk will enter:

Plaintiff, who seeks to prevent her former partner from obtaining parent-child contact with the parties' child, appeals the family court's order dissolving the parties' civil union and awarding parental rights and responsibilities. We affirm.

We remanded this matter to the family court after concluding on interlocutory review in a lengthy opinion that the parties' civil union was valid and that the court had jurisdiction to dissolve the union and issue a temporary custody order. Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶¶ 2, 72, 180 Vt. 441. In so ruling, we rejected plaintiff's arguments that: (1) the family court should have given full faith and credit to a later Virginia court decision; (2) the parties' civil union is void because such a union would have been void in Virginia, the state in which both parties were residents at the time they entered into their civil union in Vermont; (3) defendant is not a parent of plaintiff's child; and (4) defendant's parental status must be decided under Virginia law. Id. ¶¶ 28, 40, 58-60. On remand, the family court dissolved the parties' civil union, distributed the parties' assets, awarded sole physical and legal parental rights and responsibilities to plaintiff, and awarded defendant parent-child contact. On appeal, plaintiff argues that the family court: (1) ignored Vermont's

choice-of-law principles in validating the parties' civil union and accepting defendant's parentage; (2) violated her constitutional rights by establishing parentage and awarding parent-child contact to a non-biological, non-adoptive person; (3) erred by not giving full faith and credit to Virginia parentage orders; and (4) abused its discretion by not allowing her to amend her complaint.

We decline to address the merits of any but the last of the issues plaintiff raises because, as the family court noted, we resolved those issues in our previous opinion, and our resolution of the issues establishes the "law of the case." Notwithstanding plaintiff's arguments to the contrary, the issues that she raises in this appeal fall squarely within the scope of this rule of practice precluding courts from reexamining issues previously decided in the same case by the same court or a higher appellate court. See Coty v. Ramsey Assocs., Inc., 154 Vt. 168, 171 (1990) (defining doctrine). If, in the instant context, we were to regard these questions "as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted." Id. (quotations omitted). None of the exceptions to the doctrine apply. There is

no new evidence or facts to consider that would affect our prior legal conclusions. Moreover, plaintiff's argument that the interests of justice compel foregoing the doctrine in this instance because a young child is being forced into contact with a stranger is nothing short of disingenuous in light of the family court's unchallenged findings regarding the child's best interests and plaintiff's contemptuous conduct. In short, there is no basis to revisit the legal challenges to the civil union that plaintiff reasserts in this appeal.

Plaintiff also argues that the family court abused its discretion by refusing to allow her to amend her complaint over three years after it was filed to seek a declaration as to the validity of the parties' civil union and to delete references in the complaint to the minor child. We find no merit to this argument. As the trial court stated, the requested amendment represents an unreasonably delayed change of tactics that would have no effect on the proceedings. The court acted well within its discretion in denying the motion. See Hickory v. Morlang, 2005 VT 73, ¶ 5, 178 Vt. 604 (mem.) ("[W]e will reverse a court's decision to deny [ ] a motion [to amend a pleading] only where there is an abuse of discretion.").

Affirmed.

BY THE COURT:
s/John A. Dooley
John A. Dooley
Associate Justice

s/Marilyn S. Skoglund
Marilyn S. Skoglund
Associate Justice

s/Brian L. Burgess
Brian L. Burgess
Associate Justice

Filed In Clerk's Office March 14, 2008.

APPENDIX B

SUPREME COURT OF VERMONT

Lisa MILLER-JENKINS

v.

Janet MILLER-JENKINS.

Nos. 04-443, 05-030.

Aug. 4, 2006.

Motion for Reargument Denied Nov. 9, 2006.

Appealed from: Rutland Family Court, Docket No. 454-11-03 Rddm; Trial Judge: William D. Cohen.

Present: REIBER, C.J., and DOOLEY, JOHNSON, SKOGLUND and BURGESS, JJ.

DOOLEY, J.

¶ 1. Lisa Miller-Jenkins appeals a family court decision finding her expartner, Janet Miller-Jenkins, to be a parent of their three-year-old child conceived via artificial insemination. On appeal, Lisa [FN1] contests three family court decisions. First, she appeals the decision by the Vermont family court that found both her and Janet to be legal parents of their child [hereinafter IMJ], and awarded Lisa temporary legal and physical rights and responsibilities of the child and Janet temporary parent-child contact. Second, Lisa appeals the family court's refusal to give full faith and credit to a Virginia court order, issued after the Vermont court's temporary custody and visitation order, that was contrary to the Vermont decree and that precluded Janet's visitation rights. Finally, Lisa appeals an order of contempt issued by the family court based on her failure to abide by the temporary visitation order.

¶ 2. We granted interlocutory appeal to address the validity of these orders. We conclude the civil union between Lisa and Janet was valid and the family court had jurisdiction to dissolve the union. Further, we decide that the family court had exclusive jurisdiction to issue the temporary custody and visitation order under both the Uniform Child Custody Jurisdiction Act (UCCJA), 15

V.S.A. §§ 1031-1051, and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000). We affirm the family court's determination that Janet is a parent of IMJ, the resulting visitation order, and the order of contempt issued against Lisa for her failure to abide by the visitation order.

¶ 3. Lisa and Janet lived together in Virginia for several years in the late 1990's. In December 2000, the parties traveled to Vermont and entered into a civil union. In 2001, while Lisa and Janet were still a couple, Lisa began to receive artificial insemination from sperm provided by an anonymous donor. Janet participated in the decision that Lisa become impregnated and helped select the anonymous donor. In April 2002, Lisa gave birth to IMJ, with Janet present in the delivery room. Lisa, Janet, and IMJ lived in Virginia until IMJ was approximately four months old and then moved together to Vermont around August of 2002. The parties lived together with IMJ in Vermont until the fall of 2003, when they decided to separate. After the separation, in September 2003, Lisa moved to Virginia with IMJ.

¶ 4. On November 24, 2003, Lisa filed a petition to dissolve the civil union in the

Vermont family court in Rutland. In her complaint, Lisa listed IMJ as the "biological or adoptive child[ ]of the civil union." Lisa requested that the court award her custodial rights and award Janet parent-child contact. The family court issued a temporary order on parental rights and responsibilities on June 17, 2004. This order awarded Lisa temporary legal and physical responsibility for IMJ, and awarded Janet parent-child contact for two weekends in June, one weekend in July, and the third full week of each month, beginning in August 2004. The family court also ordered Lisa to permit Janet to have telephone contact with IMJ once daily.

¶ 5. Although Lisa permitted the first court ordered parent-child-contact weekend, she did not allow Janet to have parent-child contact after that date, nor did she allow Janet to have telephone contact with IMJ, as the family court had ordered. In fact, Lisa has not allowed Janet to have any contact with IMJ other than during that first weekend. Meanwhile, on July 1, 2004, after the Vermont court had already filed its temporary custody and visitation order and parentage decision, Lisa filed a petition in the Frederick County Virginia Circuit Court and asked that court to establish IMJ's parentage.

¶ 6. In response, on July 19, 2004, the Vermont court reaffirmed its "jurisdiction over this case including all parent-child contact issues," stated that it would not "defer to a different State that would preclude the parties from a remedy," and made clear that the temporary order for parent-child contact was to be followed. It added that "[f]ailure of the custodial parent to allow contact will result in an immediate hearing on the need to change custody."

¶ 7. Although the Vermont and Virginia courts consulted by telephone, an interstate parental-rights contest ensued. On September 2, 2004, the Vermont court found Lisa in contempt for willful refusal to comply with the temporary visitation order. On September 9, the Virginia court held it had jurisdiction to determine the parentage and parental rights of IMJ and that any claims of Janet to parental status were "based on rights under Vermont's civil union laws that are null and void under Va.Code § 20-45.3." On October 15, the Virginia court followed with a parentage order finding Lisa to be the "sole biological and natural parent" of IMJ and holding that Janet has no "claims of parentage or visitation rights over" IMJ. That order is on appeal to the Virginia Court of Appeals.

¶ 8. On November 17, 2004, the Vermont court found that both Lisa and Janet had parental interests in IMJ and set the case for a final hearing on parental rights, property, and child support. Thereafter, on December 21, 2004, the Vermont court issued a ruling refusing to give full faith and credit to the Virginia parentage decision. Lisa appealed both of these decisions, as well as the decision finding her in contempt.

I. Interstate Jurisdiction and Full Faith and Credit

¶ 9. This case is, at base, an interstate jurisdictional dispute over visitation with a child. Lisa argues here that the Vermont family court should have given full faith and credit to the Virginia court's custody and parentage decision, which determined Janet had no parentage or visitation rights with respect to IMJ. The family court rejected this argument because it concluded the Virginia decision did not comport with the PKPA, "which was designed for the very purpose of eliminating jurisdictional battles between states with conflicting jurisdictional provisions in child custody disputes." The Vermont court determined it had exercised jurisdiction consistent with the requirements of the PKPA and had continuing jurisdiction

at the time Lisa's action was filed in Virginia. Therefore, it further concluded the Virginia court was prohibited from exercising jurisdiction by the PKPA, § 1738A(g), and the Vermont court had no obligation to give full faith and credit to the conflicting Virginia decision.

¶ 10. In analyzing Lisa's arguments, we note that she does not contest that if she and Janet were a validly married heterosexual couple, the family court's PKPA analysis would be correct. Because of her tacit acceptance of the family court's analysis with regard to jurisdiction under the PKPA, we provide only a summary description of why we believe that the family court was correct.

¶ 11. The purpose of the PKPA is to determine when one state must give full faith and credit to a child custody determination of another state, such that the new state cannot thereafter act inconsistently with the original custody determination. Thompson v. Thompson, 484 U.S. 174, 181, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988). The PKPA follows on, and includes many of the provisions of, the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in Vermont as 15 V.S.A. §§ 1031-1051. These acts were adopted to respond to "a growing public concern over the

fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of several states." National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction Act, Prefatory Note (1968). The PKPA embodies preferences "to leave jurisdiction in the state which rendered the original decree[,] ... to promote the best interests of the child[,] ... [and to] discourage[ ] interstate abduction and other unilateral removals of children for the purpose of obtaining a favorable custody decree." Michalik v. Michalik, 172 Wis.2d 640, 494 N.W.2d 391, 398 (1993).

¶ 12. The PKPA applies equally to a visitation determination, requiring states to enforce "any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a). Because the first custody and visitation determination with respect to IMJ was made by the Vermont court, we must first examine whether that court exercised jurisdiction "consistently with the provisions of" the PKPA. Id. If it did, and if it continued to have jurisdiction when Lisa filed her proceeding in the Virginia court, the Virginia court was without jurisdiction to modify the Vermont

order. Id. § 1738A(g), (h).

¶ 13. In order for a Vermont court to exercise jurisdiction consistent with the PKPA, it must have jurisdiction under Vermont law, id. § 1738A(c)(1), and meet one of four conditions, id. § 1738A(c)(2)(A)-(D). In this case, it met the condition in subsection (A)(c)(2)(A)(ii) that Vermont "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." Id. § 1738A(c)(2)(A)(ii). For purposes of this provision, "home State" is defined to mean "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months." Id. § 1738A(b)(4). Because Vermont had been IMJ's home state within six months before Lisa filed her dissolution petition in November 2003, Lisa had removed IMJ from Vermont, and Janet lived in Vermont on the date the dissolution proceeding was commenced, the requirements of subsection (A)(ii) were met. See Matthews v. Riley, 162 Vt. 401, 406, 649 A.2d 231, 236 (1994).

¶ 14. The PKPA also requires that the court have jurisdiction under Vermont law. Whether local jurisdiction is present is determined by the UCCJA. 15 V.S.A. § 1032(a); Matthews, 162 Vt. at 406, 649 A.2d at 235. For the exact reason that the Vermont proceeding met the PKPA condition discussed above, supra, ¶ 13, it met the identically-worded provision of the UCCJA. Compare 15 V.S.A. § 1032(a)(1)(B) with 28 U.S.C. § 1738A(c)(2)(A)(ii). Thus, the family court had jurisdiction under Vermont law as required by 28 U.S.C. § 1738A(c)(1).

¶ 15. Because the Vermont dissolution proceeding was still pending in July 2004, when Lisa filed her action in the Virginia court, and the Vermont proceeding was consistent with the PKPA, the Virginia court lacked jurisdiction pursuant to § 1738A(g) of the PKPA. That section specified that the court could not exercise jurisdiction over a proceeding to determine the custody of, or visitation with, IMJ while the Vermont proceeding was pending. The Virginia court violated this section by exercising jurisdiction over the case filed by Lisa.

¶ 16. Because the Vermont court had issued a temporary custody and visitation order, the Virginia court was also governed by §

1738A(h) of the PKPA. That section prohibited the Virginia court from modifying the Vermont court's order unless the Vermont court "no longer [had] jurisdiction to modify such determination" or had "declined to exercise jurisdiction to modify such determination." Since the Vermont court continued to exercise jurisdiction over the Vermont proceeding, the Virginia court could have modified the order only if the Vermont court had lost its initial jurisdiction. Under the PKPA, a court that had initial jurisdiction to issue a custody or visitation order continues to have jurisdiction as long as it continues to have jurisdiction under state law and one of the contestants remains a resident of the state. Id. § 1738A(d); Matthews, 162 Vt. at 407, 649 A.2d at 236. The latter requirement is met because Janet continues to reside in Vermont.

¶ 17. Again, the former requirement of continuing jurisdiction is met if it is authorized by the UCCJA. See Matthews, 162 Vt. at 407, 649 A.2d at 236-37. At the time the Virginia court acted, the Vermont court had jurisdiction to modify its own visitation order if:

(2) it is in the best interest of the child that a court of this state assume jurisdiction

because:

(A) the child and his parents, or the child and at least one contestant, have a significant connection with this state; and

(B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

15 V.S.A. § 1032(a)(2). These provisions were met because IMJ had recently resided in Vermont and the evidence of IMJ's relationship with Janet was present in Vermont. Matthews, 162 Vt. at 412, 649 A.2d at 239.

¶ 18. The Vermont court had continuing jurisdiction over the matter of Janet's visitation with IMJ. Therefore, the Virginia order extinguishing Janet's visitation right was issued in violation of § 1738A(h) of the PKPA. The Vermont court was not required to give full faith and credit to the Virginia order issued in violation of the PKPA. Matthews, 162 Vt. at 412-13, 649 A.2d at 240.

¶ 19. Lisa makes three arguments against applying this analysis in this case. First, she argues that the Virginia proceeding is a parentage action, and the PKPA does not apply to parentage actions. Even if we were to accept this argument, we do not understand how it would determine the question before us--that is, whether the Vermont court must give full faith and credit to the Virginia parentage decision. Apparently, Lisa's logic is as follows: Although the Vermont court determined that Janet is a parent of IMJ, the Virginia court could and did determine that Janet is not a parent of IMJ; the Vermont court must now accept the Virginia determination and strike any visitation order based upon the Vermont parentage determination. Whether Virginia must enforce the Vermont visitation order is not directly involved in this appeal, but that is an entirely different question from whether full faith and credit requires the Vermont court to strike its own visitation order because the Virginia court refuses to recognize its validity based entirely on Virginia law. In Medveskas v. Karparis, 161 Vt. 387, 395, 640 A.2d 543, 546-47 (1994), we held that we would not extend full faith and credit to another state's custody determination if that state's court refused to extend full faith and credit to an earlier Vermont custody order. We will not give "greater faith and credit to the judgments of

the courts of other states" than we give to our own courts' judgments. Id. at 394, 640 A.2d at 546 (quotations omitted). The same reasoning applies here.

¶ 20. Lisa is making the curious argument that if the PKPA does not apply to this dispute, Vermont will be required to give full faith and credit to the Virginia parentage decision and custody and visitation order. Our cases have routinely stated exactly the opposite position--that is, in the absence of a requirement imposed by the PKPA, Vermont courts will not extend full faith and credit to another state's custody and visitation order. See Rocissono v. Spykes, 170 Vt. 309, 316, 749 A.2d 592, 597 (2000) (Arizona's assertion of jurisdiction over custody dispute was inconsistent with the PKPA "and thus not entitled to full faith and credit"); Columb v. Columb, 161 Vt. 103, 107, 633 A.2d 689, 691 (1993) (custody order that does not meet PKPA requirements "is not entitled to full faith and credit in other states").

¶ 21. In any event, we reject the argument that the PKPA is inapplicable. The PKPA applies to custody or visitation determinations. 28 U.S.C. § 1738A(a). It defines a "custody determination" as "a judgment, decree, or other order of a court

providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications." Id. § 1738A(b)(3). It defines a visitation determination in nearly identical terms. Id. § 1738A(b)(9). Lisa's dissolution petition to the Rutland Family Court sought a custody determination, and the court's temporary order included a temporary determination of both custody and visitation. Lisa's parentage petition in the Virginia court sought a determination that Janet had no parental rights, and the Virginia court issued a temporary order requiring Janet's visitation to be supervised and then a permanent order that Janet had no right to visit IMJ. Plainly, the Virginia court decisions included visitation determinations as the term is defined in the PKPA. Just as plainly, the PKPA applied to those decisions.

¶ 22. Lisa's argument, then, is that a custody or visitation determination arising out of one kind of proceeding is covered by the PKPA, and a custody or visitation determination arising out of another is not. All of the decisions interpreting the PKPA in private family disputes conclude that the PKPA draws no such distinction. Martinez v. Reed, 623 F.Supp. 1050, 1055 (E.D.La.1985) (PKPA applies to guardianship decision); Guernsey v. Guernsey, 794 So.2d 1108, 1110

(Ala.Civ.App.1998) (parentage); Ray v. Ray, 494 So.2d 634, 637 (Ala.Civ.App.1986) (guardianship); In re Pima County Juvenile Action No. J-78632, 147 Ariz. 527, 711 P.2d 1200, 1206 (Ct.App.1985) (dependency proceeding initiated by grandfather), rev'd on other grounds, 147 Ariz. 584, 712 P.2d 431, 435 (1986); In re B.B.R., 566 A.2d 1032, 1040 n. 24 (D.C.1989) (habeas corpus); E.E.B. v. D.A., 89 N.J. 595, 446 A.2d 871, 876 (1982) (habeas corpus); In re Bean, 132 N.C.App. 363, 511 S.E.2d 683, 686 (1999) (termination of parental rights). In fact, this Court recently held that the PKPA applied to a guardianship proceeding from another state. Jackson v. Hendricks, 2005 VT 113, ¶ 9 n. 1, 179 Vt. ----, 893 A.2d 292 (mem.). The one case on which Lisa relies found that the PKPA did not apply to a parentage proceeding precisely because no party asked for a custody or visitation order and the court did not address custody or visitation. Sheila L. v. Ronald P.M., 195 W.Va. 210, 465 S.E.2d 210, 221 (1995). Such a situation is inapposite to the circumstances in this case.

¶ 23. We recognize that some courts have held the PKPA does not apply to neglect and dependency proceedings where the state is intervening to protect the child, see In re A.L.H., 160 Vt. 410, 413 n. 2, 630 A.2d 1288, 1290 n. 2 (1993) (citing cases), and Lisa has

referenced these cases. These cases rely on three rationales: (1) the UCCJA explicitly applies to "neglect and dependency proceedings," 15 V.S.A. § 1031(3), and the PKPA, which was drafted to generally track the UCCJA, intentionally omitted that language, see L.G. v. People, 890 P.2d 647, 661-62 (Colo.1995); In re L.W., 241 Neb. 84, 486 N.W.2d 486, 500-01 (1992); State ex rel. Dep't of Human Servs. v. Avinger, 104 N.M. 255, 720 P.2d 290, 292 (1986); (2) the purpose of the PKPA is to address the interstate enforcement of child custody decrees, and, in particular, particularly to address child-snatching, and not to interfere with a state's protection of a dependent and neglected child, see L.G., 890 P.2d at 661-62; In re L.W., 486 N.W.2d at 500-01; Avinger, 720 P.2d at 292; and (3) the continuing jurisdiction section of the PKPA, § 1738A(d), refers to a contestant, a term defined in § 1738A(b)(2) not to include the state, see In re L.W., 486 N.W.2d at 500-01. None of these rationales suggests that the PKPA should not apply in this visitation dispute between private parties.

¶ 24. For the above reasons, we reject Lisa's argument that the PKPA does not apply to the Virginia parentage decision. We hold that the PKPA applies to this case and does not command the Vermont court to give full

faith and credit to the parentage decision of the Virginia court that was issued in violation of the PKPA.

¶ 25. Lisa's second argument is that the PKPA has been superseded by the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2000), and DOMA requires that the Vermont court give full faith and credit to the Virginia decision and order. DOMA reads:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Id. Lisa argues that a Vermont civil union is a relationship between persons of the same sex that is treated as a marriage under Vermont law and that Janet's right of visitation, if any, arises from that

relationship. Thus, she argues that DOMA authorized the Virginia court to reject any right of visitation based on the Vermont court order, and the Vermont court must give full faith and credit to the Virginia order.

¶ 26. The family court concluded that DOMA would not provide Lisa the relief she sought:

> Nor is the application of the PKPA in this case, as Lisa's counsel has suggested, hindered by the more recently enacted Federal Defense of Marriage Act (DOMA).... Whether or not a Virginia court may be permitted under DOMA to decline to give effect to the judicial proceedings in Vermont in a Virginia court is not relevant to the essential question before this court, or before the court of Virginia as a prerequisite for exercising its jurisdiction, of whether this Vermont court had jurisdiction under Vermont law over this dispute before it was filed in Virginia. Clearly Vermont has jurisdiction and therefore the Commonwealth of Virginia's judgment is not entitled to full

faith and credit.

Janet urges us to affirm on a broader and different ground: that DOMA and the PKPA should be construed to be consistent; this consistent construction would be that DOMA does not apply to custody and visitation orders.

¶ 27. We affirm on the ground employed by the Vermont court. This case is about whether the Vermont court must give full faith and credit to the decision of the Virginia court, and not the reverse. Unlike the PKPA, in no instance does DOMA require a court in one state to give full faith and credit to the decision of a court in another state. Its sole purpose is to provide an authorization not to give full faith and credit in the circumstances covered by the statute. Thus, DOMA does not aid Lisa's attack on the Vermont order.

¶ 28. Under Lisa's interpretation, we would be required to give full faith and credit to the Virginia court's decision not to give effect to the fully valid order of the Vermont court. Indeed, if we were to accept that argument, the Vermont biological parent of a child born to a civil union could always move to another state to make a visitation order

unenforceable in every state, including Vermont. As we discussed above in relation to Lisa's PKPA argument, supra, ¶ 19, we held in Medveskas, 161 Vt. at 394, 640 A.2d at 546, that we will not give "greater faith and credit" to another state's judgment that is in conflict with a valid judgment of our own courts. Because we can affirm on this narrow ground, we need not reach the broader question of whether DOMA, and not the PKPA, governs to determine the effect of a Vermont custody or visitation decision based on a civil union.

¶ 29. Lisa's third ground for arguing the PKPA does not apply is that the civil union was void because both Janet and Lisa were residents of Virginia when they entered the civil union in Vermont, and, as a result, Virginia courts did not have to recognize it. We consider this argument in the next section of the opinion and reject it.

¶ 30. In summary, none of Lisa's arguments change our conclusion that this is a straightforward interstate jurisdictional dispute over custody, and the governing law fully supports the Vermont court's decision to exercise jurisdiction and refuse to follow the conflicting Virginia visitation order.

II. The Validity of the Civil Union

¶ 31. Lisa next argues the civil union of her and Janet is void as a matter of law because it was entered into when both parties were residents of Virginia and would have been void if entered into in Virginia. She then argues that since the civil union is void, the temporary visitation order based upon the civil union is also void. In making these arguments, she relies first upon 15 V.S.A. § 6, which provides:

> A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

She argues that because same-sex legal unions are void in Virginia, Vermont must also find their union void. Lisa recognizes that § 6 alone, which applies to marriages, does not void the civil union. As we held in Baker v. State, 170 Vt. 194, 201, 744 A.2d

864, 869 (1999), a union between partners of the same gender is not defined by Vermont law as a marriage. The Legislature explicitly codified this holding in 15 V.S.A. § 8.1999, No. 91 (Adj.Sess.), § 25. Thus, Lisa argues, § 6 applies to civil unions as well as marriages as a result of 15 V.S.A. § 1204(a), a section of the civil union statute, which states:

> Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

Accordingly, Lisa argues § 1204(a) incorporates § 6 and voids her union to Janet.

¶ 32. The Vermont court did not address these arguments because Lisa failed to raise them. Thus, Janet's first response on appeal is that we should not reach Lisa's arguments on this point because they have not been preserved. Janet also notes that even if § 6 applies to civil unions, whether § 6 would even fit the facts of this case is in dispute. For example, at the time the parties entered

into the civil union in 2000, Virginia law prohibited "[a] marriage between persons of the same sex" and made such marriages entered into in another state "void" in Virginia, Va.Code Ann. § 20-45.2 (West 2005), but it was silent on the effect of civil unions. Only in 2004 did Virginia enact a comparable statute prohibiting civil unions. Id. § 20-45.3 (effective July 1, 2004). Thus, whether a civil union entered into in Vermont in 2000 would have been void if 15 V.S.A. § 6 applied remains a question. Further, § 6 applies only if the parties are "residing and intending to continue to reside in another state or jurisdiction." The record specifies that Lisa and Janet resided in Virginia at the time of the civil union, but it is silent on their intent for the future.

¶ 33. Lisa argues that despite these issues, we should decide the validity of the civil union because it is jurisdictional. Although we question that characterization, we exercise our discretion to reach the merits because it involves a pure question of law, on which our review is de novo, see, e.g., Kelly v. Lord, 173 Vt. 21, 34, 783 A.2d 974, 985 (2001) (exercising discretion to hear appeal from nonfinal judgments), and further involves a matter of public interest.

¶ 34. On the merits, we are guided at the outset by familiar canons of statutory construction. Our overall goal in construing a statute is to implement the intent of the Legislature. Farris v. Bryant Grinder Corp., 2005 VT 5, ¶ 8, 177 Vt. 456, 869 A.2d 131. In pursuing this goal, we normally apply the plain meaning of the statute if it is unambiguous. Id. Where there is uncertainty about legislative intent, "we must consider the entire statute, including its subject matter, effects and consequences, as well as the reason for and spirit of the law." In re Hinsdale Farm, 2004 VT 72, ¶ 5, 177 Vt. 115, 858 A.2d 249.

¶ 35. Here, we believe that the plain meaning of the civil union statute, 15 V.S.A. § 1204(a), is inconsistent with Lisa's argument and does not incorporate § 6. Section 1204 plainly addresses the responsibilities of persons who have entered into a civil union and not the eligibility for that status. This plain meaning is reinforced by the fact that the Legislature specifically included another section in the same chapter, entitled "Requisites of a valid civil union," id. § 1202, referring to eligibility for civil unions, and did not include residency as one of its requirements. More generally, the statute on which Lisa relies to support her claim that the civil union is void, § 6, is part of chapter

1 of Title 15, which establishes the requirements of marriage. Where the Legislature intended that chapter 1's requirements apply to civil unions, it said so directly by a separate provision of the civil union chapter, see id. § 1203 (disallowing parties from entering into civil unions with the same specified relatives the marriage statute also prohibits parties from marrying), or by amending the marriage statute so that it also applied to civil unions, id. § 4 (voiding marriages when previous marriage or civil union is still in force). These provisions would be superfluous if § 1204 generally made chapter 1 applicable to civil unions. Accordingly, there is no indication that the Legislature intended to apply chapter 1 generally to civil unions or to apply specific sections beyond those explicitly adopted.

¶ 36. Beyond the statute's plain language, there are other indications that the Legislature did not intend § 6 apply to civil unions. First, it is evident the Legislature expected that nonresidents would obtain civil unions, as it specifically provided that any town clerk in the state could issue a license to applicants "if neither is a resident of the state." 18 V.S.A. § 5160(a). We take judicial notice that Vermont was the first state to offer civil unions. Thus, under Lisa's broad interpretation of 15 V.S.A. § 6, which she

applies even to states with no explicit prohibition on civil unions, no resident of another state who intended to remain a resident of that state could have validly entered into a Vermont civil union because no other state allowed civil unions at that time. [FN2] Section 5160(a) of Title 18 evidences the absurdity of that claim.

¶ 37. Moreover, where the Legislature intended to impose a residency requirement on couples in civil unions--that is, in the case of dissolution--it stated so explicitly. See 15 V.S.A. § 1206 ("The dissolution of civil unions shall follow the same procedures ... that are involved in the dissolution of marriage ..., including any residency requirements."). In addition, the Legislature specifically required town clerks to provide civil union applicants with information to advise them "that Vermont residency may be required for dissolution of a civil union in Vermont." 18 V.S.A. § 5160(f) (emphasis added). In this context, we take the absence of an explicit statement that residency would normally be required for civil union formation as a strong indication that the Legislature intended no such requirement.

¶ 38. Finally, the Legislature has charged the Secretary of State and the Commissioner

of Health with providing public information about the requirements and procedures of the statute, see 15 V.S.A. § 1207(a) (Commissioner of Health to supply forms); 18 V.S.A. § 5160(f) (Secretary of State to provide information to be handed out by town clerks), and created and charged the Vermont Civil Union Review Commission with implementing a plan "to inform members of the public ... about the act," 1999, No. 91 (Adj.Sess.), § 40(c). We give some deference to the construction of the applicable statutes by these implementing agencies. Laumann v. Dep't of Pub. Safety, 2004 VT 60, ¶ 7, 177 Vt. 52, 857 A.2d 309; Agency of Natural Res. v. Deso, 2003 VT 36, ¶ 14, 175 Vt. 513, 824 A.2d 558 (mem.). [FN3] The Secretary of State has created an online pamphlet, entitled "The Vermont Guide to Civil Unions" (revised Aug. 2005), which states in Part 3 that "[t]here are no residency or citizenship requirements for Vermont Civil Unions." http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html (last visited July 31, 2006). The Commissioner of Health has also posted an online pamphlet entitled "Civil Unions in Vermont: Questions and Answers to Help you Plan your Vermont Civil Union." It states in response to the first question, "Who can form a civil union?," that "[y]ou do not have to be Vermont residents to form a civil union in Vermont." ht

tp://healthvermont.gov/research/records/civil.pdf(last visited July 31, 2006). Necessarily, these officials have adopted a different construction of the civil union statutes from that urged by Lisa in this case.

¶ 39. Although the Vermont Civil Union Review Commission has not provided additional public commentary, it issued a report in 2002 that stated that 4,371 civil unions had been completed as of January 2002, and that:

> Most civil unions have involved parties who are nonresidents. The proportion of civil unions involving Vermont residents continues to decrease. In July 2000, 29% of civil unions involved Vermont residents. This number dropped to 22% in August and September of 2000, and, currently, 11% of people entering civil unions are Vermonters. Residents from 48 states, the District of Columbia, Canada and several other countries have established civil unions in Vermont. Besides Vermont, the largest numbers of civil union parties have been residents of

New York, Massachusetts and California.

Report of the Vt. Civil Union Review Comm'n, Finding 3 (Jan.2002), http://www.leg.state. vt.us/baker/Final CURCReportfor2002.htm (last visited July 31, 2006). It concluded that "Act 91 Is Working As Intended." Id., Conclusion 6. The Commission could not reach that conclusion if it found that the Legislature intended to prohibit nonresidents from entering civil unions in Vermont because their states of residency would not recognize their unions. Further, the Legislature has taken no action in response to the Commission's report, as one might expect if the overwhelming use of civil unions by nonresidents was unintended.

¶ 40. We hold that the Legislature did not intend to apply to civil unions the prohibition on certain nonresidents entering into Vermont marriages. As a result, we hold that the civil union between Lisa and Janet was valid. Accordingly, we reject Lisa's argument that the temporary visitation order is void because the civil union is void.

III. The Parentage Determination

¶ 41. Lisa's third argument attacks the temporary visitation order on the basis that Janet is not a parent of IMJ. [FN4] She argues that Janet cannot be a parent of IMJ because she is not biologically connected to her. In making this argument, Lisa looks primarily to the Parentage Proceedings Act, 15 V.S.A. §§ 301-308. Under § 308(4):

> A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if ... (4) the child is born while the husband and wife are legally married to each other.

This statute applies to civil unions by virtue of § 1204(f):

> (f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

See also id. § 1204(d) ("The law of domestic

relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

¶ 42. Lisa contends that because the Legislature used the word "natural" in § 308(4), it must have intended the presumption of parentage to apply only to a person who is biologically connected to the child. She argues, therefore, that because she is IMJ's biological mother, and Janet is not, Janet cannot be a parent of IMJ. If Janet is not IMJ's parent, Lisa continues, then the family court erred in awarding Janet visitation.

¶ 43. The Vermont court responded to Lisa's argument by holding that, because Lisa gave birth through artificial insemination, the presumption of parentage contained in § 308 applied to Janet, just as it would have applied to Lisa's husband if she had had one at the time of the birth.

¶ 44. Section 308(4) was not intended to produce the result Lisa advances and is ultimately irrelevant to the circumstances creating parenthood in this case. The presumption provision was added to § 308 quite recently, see 1993, No. 228 (Adj.Sess.),

§ 13 (adding subsection (4) to 15 V.S.A. § 308), apparently to make the collection of child support easier, see 15 V.S.A. § 293(b) (where presumption applies, it is a "sufficient basis for initiating a support action ... without any further proceedings to establish parentage"). We have examined the legislative history of the statute and can find no indication that it was intended to govern the rights of parentage of children born through artificial insemination or to same-sex partners, or to do anything other than provide a speedy recovery of child support. Thus, to accept Lisa's argument, we would have to find that Lisa's desired effect of § 308(4) is an unintended consequence of a legislative amendment enacted for a different purpose. As explained below, we find § 308(4) does not have that unintended consequence.

¶ 45. Ultimately, we have both a short and a long answer to Lisa's argument regarding the effect of § 308(4), and, because of the public interest in the issue, we provide both. The short answer is that the issue is controlled by this Court's decision in Paquette v. Paquette, 146 Vt. 83, 499 A.2d 23 (1985), under which the presumption of parentage contained in § 308 is irrelevant. In Paquette, the parties were involved in a divorce and the husband sought custody of both the child born of the marriage and

another child born of the wife's prior marriage. The lower court ruled that custody could not be awarded to a stepfather and, on that basis, denied the husband custody of the older child. On appeal, this Court reversed, holding that where the stepparent has assumed the role of a parent with respect to the child--that is, had acted "in loco parentis"--the lower court can give custody to the stepparent, over the opposition of the biological parent, if it finds that it is in the best interest of the child to do so and "the natural parent is unfit or ... extraordinary circumstances exist to warrant such a custodial order." Id. at 92, 499 A.2d at 30.

¶ 46. Paquette does not explicitly discuss visitation, but its rationale fully applies to visitation as well as to custody. See S. Silverman, Stepparent Visitation Rights: Toward the Best Interests of the Child, 30 J. Fam. L. 943, 948 (1992) (characterizing Paquette as a stepparent visitation case). In fact, the concerns expressed about the possible interference with the rights of biological parents are of much less weight in the case of visitation.

¶ 47. Under Paquette, regardless of the meaning of 15 V.S.A. § 308(4), Janet has at least the status of a stepparent of IMJ by

virtue of § 1204(d) and (f). Assuming extraordinary circumstances are even required for a visitation order, we conclude that extraordinary circumstances are present in this case. The court's findings demonstrate that Janet acted in *loco parentis* with respect to IMJ as long as Janet and Lisa were together. Thus, our short answer to Lisa's argument is that the visitation order is supported by Paquette even if Janet is not considered IMJ's parent under § 308(4).

¶ 48. There is also a longer answer to Lisa's argument that biology must control the parentage issue. We find that Janet has status as a parent, even beyond her stepparent status under Paquette. If we were to accept Lisa's opposing position and conclude biology controlled, a child born from artificial insemination would have no second parent--whether that status is sought by a man married to the child's mother or by a woman or man in a civil union with the child's biological parent--unless the putative second parent adopted the child. In fact, the logical extension of Lisa's position that a biological connection is necessary for parentage is that the husband of a wife who bears an artificially inseminated child cannot be the father of that child, just like a civil union spouse cannot be a parent to the child. Such a holding would cause tremendous

disruption and uncertainty to some existing families who have conceived via artificial insemination or other means of reproductive technology, and we must tread carefully so that we incur such a consequence only if necessary. As a result, we reach the broader and longer answer to Lisa's argument and conclude that such a holding would be wrong.

¶ 49. We are facing a situation similar to that in In re B.L.V.B., 160 Vt. 368, 628 A.2d 1271 (1993), which was decided before the civil union law and involved a same-gender couple. As in this case, one member of the couple in In re B.L.V.B. conceived a child through artificial insemination, and her partner sought to adopt the child to also become a parent. The probate court ruled that the governing statute, which stated that a child's natural parent's rights shall not be affected when the parent's spouse adopts the child, required that if the adoption were granted to the same-sex partner, the biological mother's parental rights would be terminated because the adopting parent was not the biological parent's spouse (or the child's stepparent).

¶ 50. Despite the language of the governing statute, we reversed in that case, holding that the probate court's result was at odds

with the intent of the Legislature: "[W]e cannot conclude that the legislature ever meant to terminate the parental rights of a biological parent who intended to continue raising a child with the help of a partner." Id. at 373, 628 A.2d at 1274. We stated further:

> When social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest....

As the case law from other jurisdictions illustrates, our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and

protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are de facto parents may be awarded custody or visitation or reached for support.

Id. at 375-76, 628 A.2d at 1275-76.

¶ 51. The disruption that would be caused by requiring adoption of all children conceived by artificial insemination by nonbiological parents is particularly at variance with the legislative intent for civil unions. The Legislature's intent in enacting the civil union laws was to create legal equality between relationships based on civil unions and those based on marriage. The Legislature added a separate section on the construction of the civil union statutes that provides in part:

> Treating the benefits, protections and responsibilities of civil marriage differently from the benefits, protections and responsibilities of civil unions is permissible only when clearly

> necessary because the gender-based text of a statute, rule or judicial precedent would otherwise produce an unjust, unwarranted, or confusing result, and different treatment would promote or enhance, and would not diminish, the common benefits and protections that flow from marriage under Vermont law.

1999, No. 91 (Adj.Sess.), § 39(a). The result of Lisa's statutory argument would be to produce separate benefits and protections for couples in civil unions. Under her argument, no partner in a civil union could be the parent of a child conceived by the other partner without formally adopting that child.

¶ 52. As in In re B.L.V.B., we face the problem here of a family with a child created by artificial insemination, and the Legislature has not dealt directly with new reproductive technologies and the families that result from those technologies. Nonetheless, the courts must define and protect the rights and interests of the children that are part of these families. See In re B.L.V.B., 160 Vt. at 376, 628 A.2d at 1276; In re Estate of Kolacy, 332 N.J.Super.

593, 753 A.2d 1257, 1263 (2000) (finding that even though child was conceived via assisted reproductive technology, "once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires"). We express, as many other courts have, a preference for legislative action, see, e.g., In re M.J., 203 Ill.2d 526, 272 Ill.Dec. 329, 787 N.E.2d 144, 150 (2003); Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 756 N.E.2d 1133, 1139 (2001), but in the absence of that action, we must protect the best interests of the child.

¶ 53. With this background in mind, we turn back to § 308(4). The purpose of the statute is to create a rebuttable presumption, the main effect of which is to assign the burden of production. Godin v. Godin, 163 Vt. 514, 530, 725 A.2d 904, 915 (1998) (Dooley, J., dissenting). Thus, the presumption serves the purpose of allowing more summary support actions even in the absence of a parentage adjudication, which effectively eases child support decisions. See 15 V.S.A. § 293(b) (where presumption of parentage under § 308 applies, a support action against the presumed parent may be filed without a prior parentage adjudication). Because the statute creates only a presumption, however, it does not prevent proof of the fact in issue

through other means. Thus, if the presumption did not apply, [FN5] the only effect in this case would be that Janet would have the burden of production to prove parenthood, a burden she assumed in presenting her case to the family court. Where the presumption cannot apply, it does not mean the individual is not a parent; it simply means we must look to see whether parentage exists without the use of the presumption--the same way we would have determined parentage before the adoption of § 308(4).

¶ 54. Lisa focuses almost exclusively on the word "natural," finding in its use the legislative intent that only biological parents can be parents for purposes of the parentage statute. [FN6] We find this to be an overly broad reading of the language. The parentage act does not include a definition of "parent." It does not state that only a natural parent is a parent for purposes of the statute. In fact, the statute is primarily procedural, leaving it to the courts to define who is a parent for purposes of a parentage adjudication. Given its origin and history, it is far more likely that the legislative purpose was to allow for summary child support adjudication in cases where biological parenthood is almost indisputable.

¶ 55. We reach then the ultimate question--whether Janet is a parent within the meaning of the parentage act--without consideration of § 308, which is irrelevant to both sides of the argument in this case. We have held that the term "parent" is specific to the context of the family involved. For instance, in In re S.B.L., 150 Vt. 294, 302, 553 A.2d 1078, 1083-84 (1988), we held that the biological father of a child born out of wedlock is not a "parent" for purposes of 14 V.S.A. § 2645, one of our guardianship statutes. Again, we stress that the difficulty in interpretation in this context arises because the Legislature has not addressed assisted reproductive technologies. Thus, we cannot discern in the parentage statutes any helpful legislative intent for such familial circumstances.

¶ 56. Many factors are present here that support a conclusion that Janet is a parent, including, first and foremost, that Janet and Lisa were in a valid legal union at the time of the child's birth. The other factors include the following. It was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent

during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition. Finally, there is no other claimant to the status of parent, and, as a result, a negative decision would leave IMJ with only one parent. The sperm donor was anonymous and is making no claim to be IMJ's parent. If Janet had been Lisa's husband, these factors would make Janet the parent of the child born from the artificial insemination. See generally People v. Sorensen, 68 Cal.2d 280, 66 Cal.Rptr. 7, 437 P.2d 495 (1968). Because of the equality of treatment of partners in civil unions, the same result applies to Lisa. 15 V.S.A. § 1204.

¶ 57. Virtually all modern decisions from other jurisdictions support this result, although the theories vary. See, e.g., Brown v. Brown, 83 Ark.App. 217, 125 S.W.3d 840, 844 (Ct.App.2003) (husband estopped from denying child support where husband knew wife was using artificial insemination to have child); Sorensen, 66 Cal.Rptr. 7, 437 P.2d at 498-500 (husband is lawful father of child conceived through artificial insemination born during marriage to child's mother); In re Buzzanca, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, 286-87 (Ct.App.1998) (finding virtually all decisions hold husband to be parent based on his consent to artificial insemination); In re M.J., 272 Ill.Dec. 329,

787 N.E.2d at 152 (mother of children conceived through artificial insemination may seek to establish paternity of man with whom she had ten-year intimate relationship based on theories of "oral contract or promissory estoppel"); Levin v. Levin, 645 N.E.2d 601, 604-05 (Ind.1994) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood of child); R.S. v. R.S., 9 Kan.App.2d 39, 670 P.2d 923, 928 (1983) (husband who orally consented to artificial insemination of wife estopped from denying fatherhood); State ex rel. H. v. P., 90 A.D.2d 434, 457 N.Y.S.2d 488, 492 (1982) (wife estopped from denying husband's paternity where she fostered parent-child relationship); Brooks v. Fair, 40 Ohio App.3d 202, 532 N.E.2d 208, 212-13 (Ct.App.1988) (public policy disallows wife from denying paternity of husband where parties agreed during marriage to conceive via means of artificial insemination); In re Baby Doe, 291 S.C. 389, 353 S.E.2d 877, 878 (1987) (husband is legal father of child where he consented to artificial insemination of wife during marriage); see generally A. Stephens, Annotation, Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 A.L.R.4th 655 (1991). Some courts find the party a parent as a result of contract theory or estoppel. E.g., R.S., 670 P.2d at 928. Estoppel

is often invoked because of the strong reliance interests that arise from consensual artificial insemination. Other courts reach the result more as a matter of policy, particularly stressing the adverse consequences of leaving the child without a parent despite the clear intention of the parties. E.g., Brooks, 532 N.E.2d at 212-13. We adopt the result in this case as a matter of policy, and to implement the intent of the parties.

¶ 58. This is not a close case under the precedents from other states. Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case. We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage. See People ex rel. R.T.L., 780 P.2d 508, 515 n. 11 (Colo.1989) ("We acknowledge that the presumption that a child born during wedlock is the legitimate child of the marriage was one of the strongest presumptions known to the common law."); Cicero v. Cicero, 58 A.D.2d 573, 395 N.Y.S.2d 117, 117 (1977) (presumption of legitimacy attached to "issue of the marriage"); LC v.

TL, 870 P.2d 374, 380 (Wyo.1994) ("The presumption of legitimacy is one of the strongest in law."); see also Godin, 168 Vt. at 522, 725 A.2d at 910 ("Thus, the State retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origins.").

¶ 59. Lisa raises three additional reasons why we cannot affirm the temporary visitation award. First, she argues that awarding Janet visitation, without a finding that Lisa is unfit to parent, interferes with her exclusive constitutional right to parent her child. See Troxel v. Granville, 530 U.S. 57, 72-73, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (indicating fundamental due process right of parents to make child rearing decisions). This argument was not adequately raised below and has been waived. See Will v. Mill Condo. Owners' Ass'n, 2004 VT 22, ¶ 4, 176 Vt. 380, 848 A.2d 336 (rejecting claim that mere mention of argument in one pretrial memorandum preserved issue for appeal). In any event, we reject it. Janet was awarded visitation because she is a parent of IMJ. Lisa's parental rights are not exclusive. See In re L.B., 155 Wash.2d 679, 122 P.3d 161, 178

(2005).

¶ 60. We have a similar response to Lisa's argument that Janet's parental status must be determined under Virginia law. Again, the argument was not preserved below. See Adams v. Adams, 2005 VT 4, ¶ 15, 177 Vt. 448, 869 A.2d 124 (arguments not raised below are not preserved for appeal). In any event, we also reject this argument. We have adopted the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 287 (1971) in determining choice-of-law questions. Id. (law of the state with the most significant relationship to the child and parent determines legitimacy); see Myers v. Langlois, 168 Vt. 432, 434, 721 A.2d 129, 130 (1998). As we held in the first section, the Vermont court had jurisdiction to adjudicate custody and visitation of IMJ under both the PKPA and the UCCJA. Although these acts primarily determine jurisdiction, their provisions are such that they establish the state with the most significant relationship to a child custody or visitation dispute. Stubbs v. Weathersby, 320 Or. 620, 892 P.2d 991, 997-98 (1995). Accordingly, we conclude that where jurisdiction is exercised consistent with the PKPA and UCCJA, the law of the forum state is applicable. In this case, as discussed in depth supra, ¶¶ 9-18, Vermont had

jurisdiction under both statutes, and, accordingly, Vermont law applies here.

¶ 61. In reaching this conclusion, we do not hold that there is an actual conflict between the law of Vermont and that of Virginia with respect to the power of the court to award visitation in cases involving same-gender partners. The parties have not pointed to any Virginia cases on point, and we have not found any. We do note, however, that a growing number of courts have recognized parental rights in a same-gender partner of a person who adopts a child or conceives through artificial insemination. See Elisa B. v. Super. Ct., 37 Cal.4th 108, 33 Cal.Rptr.3d 46, 117 P.3d 660, 670 (2005) (same-gender partner is presumed mother of twins conceived by artificial insemination and is responsible for child support); In re E.L.M.C., 100 P.3d 546, 562 (Colo.Ct.App.2004) (same-gender partner who is psychological parent of child adopted by other partner may be awarded joint parental responsibilities); C.E.W. v. D.E.W., 845 A.2d 1146, 1151-52 (Me.2004) (court may award parental rights and responsibilities to same-gender partner who is de facto parent of child); E.N.O. v. L.M.M., 429 Mass. 824, 711 N.E.2d 886, 892-93 (1999) (probate court can provide visitation to same-gender partner of biological mother who is de facto parent of

child); V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539, 552-54 (2000) (same-gender partner who is a psychological parent to child may be awarded custody of, or visitation with, the child); T.B. v. L.R.M., 567 Pa. 222, 786 A.2d 913, 920 (2001) (where same-gender partner is in loco parentis with consent of child's biological mother, court may award partial custody or visitation); Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I.2000) (court may award visitation to same-gender partner based on theory of estoppel); In re L.B., 122 P.3d at 176(same-gender partner who is de facto parent has same right to custody as biological mother); In re H.S.H.-K., 193 Wis.2d 649, 533 N.W.2d 419, 435-37 (1995) (same-gender partner with parent-like relationship with child can be awarded visitation, but not custody). In these cases, there was no marriage or civil union between the partners. This result was endorsed in 2000 by the American Law Institute. Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03, cmt. (b)(iii), at 114. It may be that the Virginia courts will follow this trend.

¶ 62. Lisa next argues that the court erred by awarding visitation without first determining parentage. Temporary relief requests in divorce or dissolution proceedings must be heard and decided promptly. 15

V.S.A. § 594a. Necessarily, a temporary order will not be based on the full record required to support a final order. A speedy decision was required in this case to allow Janet to have some contact with IMJ, pending resolution of the dispute over custody and visitation. Meanwhile, Lisa went through three lawyers during the early stage of the dissolution action. Her complaint alleged that Janet was a parent of IMJ, and she maintained that position through the first day of the temporary relief hearing. Indeed, her counsel stated on the record that Lisa waived any claim that Janet was not a parent of IMJ. Thereafter, with a new lawyer, she attempted to change her position, to roughly the position she espouses here. She sought to delay the temporary relief proceeding while she adjudicated whether Janet was a parent, and she argued that the court should give no interim relief until parenthood was fully resolved. We believe the family court acted within its broad discretion in awarding temporary visitation as it did, even if it could not make a final determination of parentage. See id. (court can make such orders pending final hearing as it could upon final hearing); V.R.F.P. 4(c)(2).

¶ 63. In any event, the timing of the court's action was harmless in this case. The family

court eventually ruled that Janet had parental status with respect to IMJ, a ruling we have affirmed. The relevant facts are largely undisputed and were before the court when it issued the temporary order. Lisa sought to delay the ruling on the basis that Janet was not the biological mother of IMJ, a fact that is undisputed and is not determinative. Thus, the timing of the court's action has no significance at this time. The Commonwealth of Virginia's judgment regarding parentage is not entitled to full faith and credit.

IV. Contempt

¶ 64. Finally, Lisa argues that we should reverse the contempt determination because it is unsupported by the record. The transcripts show that on May 26, 2004, the trial judge granted Janet parent-child contact via a bench ruling issued on the record, and Janet's lawyer was to prepare a written order. The oral order provided for visitation for the weekends of June 4-6 and June 18-20, the week in July starting July 25, and one week per month in Vermont starting August 2004. The order also provided for Janet to have daily telephone contact with IMJ. At the hearing, Lisa explicitly stated that she waived any

objection to the visitation on June 4-6, June 18-20, and for the week in July beginning July 25: "[W]e have no objection to the visitation proposed [regarding these dates] ...." Janet's lawyer filed the proposed order on May 28, but it was not signed and filed until June 17. Meanwhile, on June 9, Lisa filed a motion to reconsider the order, saying that it had been "issued from the bench." The written order, requiring the same visitation as previously had been ordered from the bench, was served on Lisa on June 25.

¶ 65. On June 5, 2004, despite the fact that the order had not yet been reduced to writing, Lisa complied with the visitation order for that weekend. Nonetheless, although the parties' versions of the reasons for the lack of visitation differ, Janet was not able to see the child as ordered on the weekend of June 18 or during the week of July 25. Janet has not had parent-child visitation with IMJ since the weekend of June 4, 2004. Both the oral and written orders also provided that Janet could have telephone contact with IMJ "once per day," but Lisa did not allow this contact, and it did not occur. Janet moved for a determination that Lisa was in contempt of the court order, and the court held a hearing at which both Janet and Lisa testified. Lisa acknowledged at the contempt hearing that, even before an

order had been issued by the Virginia court, she did not agree with the family court's visitation order, and had no intention of complying with it. On September 2, the Vermont court found that Lisa had failed to comply with the parent-child contact requirements, specifically finding that "Lisa has wilfully refused to comply with this court's order regarding visitation since mid-June, solely because she does not like it."

¶ 66. Lisa makes no argument on appeal to justify her refusal to allow telephone contact between Janet and IMJ. At the contempt hearing, Lisa suggested that the telephone contact did not occur because the times during which Janet attempted to contact the child were inconvenient; Janet, in turn, stated that her numerous and repeated attempts always resulted in busy signals, rebuffs by Lisa, and answering machines. Lisa acknowledges that Janet and IMJ did not actually converse on the telephone after the weekend of June 18, as was required per the temporary order.

¶ 67. Lisa argues on appeal that she did not violate the order with respect to the July visitation because Janet appeared at her home when she knew Lisa and IMJ would be at church. Again, the court's order was

explicit that Janet was entitled to visitation starting on July 25, 2004, and the record is clear that the ordered visitation did not occur despite Janet's attempt.

¶ 68. With respect to the June visitation, Lisa makes a legal argument that she had no obligation to provide visitation because the written order had not been served upon her. Lisa's argument is disingenuous. The family court made the temporary visitation order orally from the bench and on the record on May 26, 2004. Lisa's presence at that hearing, with representation by counsel, is undisputed. Furthermore, at the hearing, Lisa explicitly stated through her attorney that she did not object to the June and July visitation dates. Lisa then further acknowledged the oral visitation order in her motion to set it aside. Lisa has not argued, and cannot argue, that she had no notice of the court's visitation order, nor does she argue that it did not provide for visitation during the weekend of June 18. She argues only that a written order had not yet been served as of the June 18 visitation date.

¶ 69. We can find no requirement that a temporary visitation order be in writing, beyond the writing created by the transcript of an oral order placed on the record. We

have recently affirmed a contempt adjudication based on an oral visitation order. See Root v. Root, 2005 VT 93, ¶ 13, 178 Vt. 634, 882 A.2d 1202 (mem.) (affirming contempt based on violation of oral order that reiterated preexisting obligation parent conceded was not followed); see also 15 V.S.A. § 603 (authorizing contempt proceedings for disobeying "lawful order," without reference to manner of order). We similarly conclude that the oral order and full notice to Lisa supported the contempt adjudication in this case.

¶ 70. Apparently, Lisa's response to her failure to comply with the August visitation provisions is that the Virginia decision superseded the Vermont order. We have rejected that argument as a matter of law. Moreover, Lisa could have complied with the Vermont order without violating any order from the Virginia court.

¶ 71. The family court found that Lisa had "wilfully refused to comply with [its] order regarding visitation," and we find no reason to overturn that finding. See Payrits v. Payrits, 171 Vt. 50, 52-53, 757 A.2d 469, 472 (2000) (family court findings will not be overturned unless clearly erroneous). For the above reasons, we reject Lisa's arguments

that the family court erred in finding her in contempt and remand for the imposition of sanctions.

¶ 72. In conclusion, the family court properly assumed jurisdiction of the action to dissolve the civil union between Lisa and Janet. The civil union was not void. The court properly found that it had jurisdiction to issue a temporary order providing Janet visitation with IMJ, and it was not required to recognize and enforce a conflicting decision of the Virginia court. Finally, the record supports the family court's decision that Lisa is in contempt of court for willfully violating the temporary visitation order.

Affirmed and remanded.

FN1. For clarity, we will refer to the parties by their first names.

FN2. Currently, California has a statute authorizing domestic partnerships, Cal. Fam.Code § 297 (West 2006), and Connecticut has a statute authorizing civil unions, Conn. Gen.Stat. §§ 46b-38aa to 46b-38oo (2006).

FN3. This might be viewed as an unconventional application of the deference rule because civil union licenses are issued by town clerks and not by the Secretary of State and Commissioner of Health. Under the statutory scheme, however, the town clerks are acting under the guidance and direction of the secretary and commissioner. If the secretary and commissioner misconstrue the statute, the lives of many civil union applicants could be dramatically affected. Indeed, the report of the Vermont Civil Union Review Commission, discussed infra, ¶ 39, indicates that if we invalidated the officials' construction of the statutory scheme in favor of Lisa's interpretation, it is likely that the vast majority of civil unions, numbering in the thousands, would be declared void were the provisions of 15 V.S.A. § 6 now applied to civil unions. We find this to be more evidence that we are effectuating the Legislature's intent on this point.

FN4. Lisa's argument assumes that the court could not issue a temporary visitation or custody order pending a determination of parentage in a civil union dissolution proceeding. The dissolution proceeding is subject to the same procedures as a divorce proceeding. 15 V.S.A. § 1206; V.R.F.P. 4(a)(1). The Legislature has provided broad

authority to award temporary relief in a divorce. 15 V.S.A. § 594a; see also V.R.F.P. 4(c)(2). Generally, the procedures applicable to a divorce are applicable to a parentage action. V.R.F.P. 4(a)(1). Thus, we are not prepared to accept Lisa's assumption. In any event, the facts are generally undisputed, and, as we hold in the text, the issue is one of law so it does not matter when the parentage determination was made in this case.

FN5. As we noted in Godin, the presumption of paternity of the husband of the mother originated at common law. 168 Vt. at 521-22, 725 A.2d at 909-10 (citing numerous historical common-law conclusions and principles for finding parentage as to both legal spouses for the child born in that union). Prior to the adoption of the recent statute, we did not have the opportunity to determine whether Vermont would recognize the common-law presumption. In view of the limited purpose of the statute--to facilitate the collection of child support--it is possible that any common-law presumption would survive. Nonetheless, we need not rely on a presumption here because the court had sufficient facts before it to determine that Janet was the parent of IMJ without the aid of a presumption.

FN6. Lisa's argument presumes that "natural" means biological. She bases that argument on our opinion in Godin, although that decision does not contain that holding explicitly. We note that other courts have not always equated these terms. E.g., In re Nicholas H., 28 Cal.4th 56, 120 Cal.Rptr.2d 146, 46 P.3d 932, 937 (2002).

APPENDIX C

ENTRY ORDER
SUPREME COURT OF VERMONT

Lisa MILLER-JENKINS

v.

Janet MILLER-JENKINS.

Nos. 2004-443 & 2005-030.

November Term, 2006.

Appealed from: Rutland Family Court, Docket No. 454-11-03 Rddm; Trial Judge: William D. Cohen.

In the above-entitled cause, the Clerk will enter:

Appellant's motion for reargument fails to identify points of law or fact overlooked or misapprehended by the Court that would probably affect the result of the appeal. See

V.R.C.P. 40. Accordingly, the motion is denied.

[ ] Publish
[x] Do Not Publish

BY THE COURT:

s/Paul L. Reiber
Paul L. Reiber
Chief Justice

s/John A. Dooley
John A. Dooley
Associate Justice

s/Denise R. Johnson
Denise R. Johnson
Associate Justice

s/Marilyn S. Skoglund
Marilyn S. Skpglund
Associate Justice

s/Brian L. Burgess
Brian L. Burgess
Associate Justice

Filed In Clerk's Office November 9, 2006.

APPENDIX D

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. F454-11-03 Rddm

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed June 17, 2004.

TEMPORARY ORDER
RE: PARENTAL RIGHTS &
RESPONSIBILITIES

This matter came on for hearing before

the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.

2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:

a) JUNE 2004: From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from

the situs of Defendant's parent-child contact to Plaintiff's residence.

b) JULY 2004: From 07/25/04 through 07/31/04. Visitation shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.

c) AUGUST 2004 and THEREAFTER: The Defendant shall have parent-child contact with Isabella in Vermont for the third full week of each month, beginning in August of 2004. Said visitation shall begin on a Saturday morning and end on Sunday evening. The Defendant shall be responsible for transporting the child from the Plaintiff's home in Winchester, Virginia, to her home in Fair Haven, Vermont, and the Plaintiff shall be responsible for transporting the child at the end of the parent-child contact period from Defendant's residence in Fair Haven, Vermont, to her residence in Winchester, Virginia.

d)OTHER TRANSPORTATION ARRANGEMENTS: Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

e) TELEPHONE CONTACT: The Plaintiff shall be permitted to have telephone contact with Isabella while she is with the Defendant once per day. The Plaintiff and Defendant will work out an appropriate time for such telephone contact having in mind Isabella's schedule. The Defendant shall have telephone contact with Isabella on a per-day basis when the child is with the Plaintiff. Similarly, the Plaintiff and Defendant shall work out a time when such contact shall take place and be appropriate considering Isabella's schedule.

3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

s/William Cohen

Judge Rutland Family Court

APPENDIX E

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed November 17, 2004.

RULING ON PLAINTIFF'S
MOTION TO WITHDRAW WAIVER
TO CHALLENGE PRESUMPTION OF
PARENTAGE

Plaintiff and defendant are parties to a Vermont civil union seeking dissolution of that union. The present dispute concerns this court's temporary order of parental rights and responsibilities concerning the minor child IMJ, born during the parties' civil union. The matter presently before the court is Plaintiff Lisa Miller-Jenkins' motion to withdraw a "waiver" to challenge the presumption of Defendant Janet Miller-Jenkins' status as a parent of the minor child IMJ. FN1

Procedural Facts

The procedural facts and history of this case are both relevant to the motion and necessary to understand the context of these proceedings. Lisa initiated the action in this court by filing a complaint for civil union dissolution on November 24, 2003. In her pro se complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. She requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact (supervised), and award payment of child support. Janet requested a temporary order on the issues of parental rights and responsibilities, parent-

child contact and property division. Janet also filed an answer and counterclaim, acknowledging that IMJ was a child of the civil union, and seeking that the court award legal and physical rights and responsibilities to her and give Lisa suitable parent/child contact.

Lisa's first attorney, Linda Reis, entered an appearance on Lisa's behalf on January 9, 2004. The hearing for a temporary order was set for February 25, 2004, and then rescheduled for March 15, 2004 on the plaintiff's request that there was not enough time allocated on the February date. A few days prior to the March hearing, Attorney Reis moved to withdraw as Lisa's attorney, stating that Lisa had hired other counsel and instructed her to discontinue work on her case. This court granted the motion conditioned upon the temporary hearing scheduled for March 15 not being continued. Lisa's second attorney, Deborah Lashman, entered an appearance on Lisa's behalf on March 12, 2004.

In a prior status conference, Attorney Reis had raised the question of parental status in the civil union context. At the start of the March 15 hearing, the court asked whether Lisa was still raising that as an

issue. Attorney Lashman responded that her interpretation of the law was different from Attorney Reis', and that she believed that because the child was born of the civil union, the presumption was that both parties were legal parents. In answer to the court's inquiry, Attorney Lashman represented that her client was waiving the issue. The court proceeded with the hearing. This discussion took place in the courtroom, on the record, while Lisa was present.

Although the March 15 hearing on the temporary order lasted several hours, testimony was not completed. The matter was continued and scheduled for completion on May 26. On May 3, Attorney Lashman moved to withdraw on the grounds of a "material breakdown" in the attorney/client relationship. She also sent to the court a notice of pro se appearance signed by Lisa. On May 14, Lisa filed a motion form with the court asking that Janet be held in contempt of a prior order relating to property issues and requesting a hearing for the purpose of revoking her waiver to challenge parentage. On May 17, Lisa moved to continue the May 26 hearing on the temporary order. The court denied the motion. On May 26, the day of the continued hearing, Lisa's third attorney, Judy Barone, entered an appearance on Lisa's behalf and filed a "Motion to Withdraw

Waiver to Challenge Presumption of Parentage." The court declined the request to halt the proceedings and testimony resumed, which resulted in a temporary order granting Lisa sole physical and legal custody and granting Janet parent-child contact. Lisa's motion regarding the "waiver" was set for a hearing before the court on August 24.

The motion asks the court to determine whether Lisa's "waiver" of the parentage issue through her second counsel was valid. Lisa's claim is that her second counsel waived the issue without her knowing consent and without an adequate explanation of how the law in Vermont would apply to the facts of this case. While the "waiver" itself is the focus of the motion before the court, the particular relief sought by Lisa's motion and the legal arguments put forth by Lisa in support of such relief require the court to examine the law of parentage applicable to the facts of this case.

The motion filed on the second day of the temporary hearing sought a discontinuation of the proceedings and asked for time for counsel to brief the court on the "matter of Plaintiff's rebuttal to the presumption of parentage." Plaintiff's request at the hearing, and in subsequent

motions, was not simply to have an opportunity to present evidence to rebut a presumption of parentage prior to a final hearing in this case. Rather, she requested that the court postpone the proceedings that had already been delayed more than two months and decline to enter any order of temporary visitation. This request was denied. Subsequently, plaintiff has requested that the court set aside its temporary order – thereby curtailing any enforceable right of Janet to have parent-child contact and depriving her of any parental interest – until such time that the court has an opportunity to hear and render a determination on whatever factual evidence Lisa might have to rebut this presumption.

Moreover, Lisa has raised legal arguments as to whether any presumption of parentage could apply to the facts of this case and whether the court even has jurisdiction to determine parentage where Janet has not initiated a parentage action. The nature of Lisa's arguments leads the court to conclude that Lisa's challenge to Janet's status as a parent is a question of law, rather than one of disputed facts. Thus, the court will first attend to the legal arguments based on the facts of this case before considering the merits of Lisa's motion and her request for relief.

Background Facts

While the court has not taken evidence specifically in the context of a "parentage" hearing, both parties testified extensively at the hearing on the temporary custody order about their relationship and the conception of IMJ. The following facts were evident from the testimony of the parties, and do not appear to be disputed:

1. The plaintiff Lisa Miller-Jenkins is currently a resident of the Commonwealth of Virginia.

2. The defendant Janet Miller-Jenkins is currently a resident of the State of Vermont.

3. In December of 2000 while both plaintiff and defendant were residents of Virginia they traveled to Vermont and obtained a civil union.

4. Both parties entered the civil union freely and voluntarily and did so to create a legal commitment to each other.

5. Both parties returned to Virginia as spouses.

6. The parties made a joint decision to employ artificial (alternative) insemination in order to have a child and to have a family.

7. This decision was jointly made and agreed to by both parties while they were legally connected by the civil union.

8. The parties made a joint decision to have Lisa be the bearing mother.

9. Both parties participated in the selection process of an anonymous sperm donor through a sperm bank.

10. Both parties participated in the decision to have the sperm donor's physical characteristics resemble those of the non-bearing mother, Janet.

11. Lisa became pregnant through the use of the sperm bank procedure and gave birth to IMJ on April 16, 2002.

12. Janet was present for the entire

delivery and cut the umbilical cord.

13. The child was born while both parties were united by civil union.

14. The artificial insemination took place in Virginia.

15. The child was delivered in Virginia.

16. The parties made a joint decision to relocate from Virginia to the State of Vermont to raise IMJ because of Vermont's Civil Union law and its rights, privileges and responsibilities. The decision to relocate was also due to the perceived inhospitality of the Commonwealth of Virginia to a same-sex couple with a child.

17. The parties moved to Vermont in August of 2002.

18. Both parties resided in Vermont until they separated in September of 2003. At that time, Lisa moved back to Virginia.

19. Janet Miller-Jenkins is not a biological parent of IMJ.

20. Janet Miller-Jenkins did not adopt IMJ.

Discussion

As stated above, the relief sought by the plaintiff and the premise of her argument requires an examination of the law regarding parental status in Vermont. The premise of plaintiff's argument is that there are only two ways in which one can be a parent under Vermont law: a biological connection or adoption. That Janet does not have a biological connection to IMJ and that Janet did not adopt IMJ has never been disputed. FN 2

Under Vermont law, "parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." 15 V.S.A. § 1204(a). "A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those

terms are used throughout the law." Id. § 1204(b). "The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to the parties to a civil union." Id. § 1204(d). "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." Id. § 1204(f). "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage...." Id. § 1206.

The clear instructions of the Vermont legislature is that this court may not treat parties to a civil union different from parties to a marriage. The court first addresses Lisa's argument that the court does not have jurisdiction to consider the issue of parentage because neither party has initiated a "parentage proceeding" in accordance with 15 V.S.A. §§ 301-308. This assertion ignores the procedural facts of this case. Lisa requested in her signed complaint for civil union

dissolution that the court determine the parental rights and responsibilities of the minor child, that the court award her sole physical and legal rights and responsibilities, that the court award Janet parent/child contact and that the court award child support. She also identified the child as a biological or adoptive child of the civil union.

Vermont's statute governing proceedings contains a statement that "a person alleged to be a parent shall be rebuttably presumed to be the natural parent of the child if ... the child is born while the husband and wife are legally married to each other." 15 V.S.A. § 308(4). The presumption that a child born while two people are married is the legitimate child of the marriage has a long tradition in the common law. See Godin v. Godin, 168 Vt. 514, 521 (1998) (noting the statutory presumption in 15 V.S.A. § 308(4) and discussing the origin of the presumption as one of the strongest and most pervasive of presumptions in the common law, citing In re Findlay, 170 N.E. 471, 472 (N.Y. 1930)). From the uncontested assertions in the complaint and answer, as well as the uncontroverted testimony that the child was born while the parties were united in a civil union, the law will presume that the parties to a civil union are the parents of that child,

just as the court would so presume the parental status of a married couple initiating a divorce and custody action and acknowledging the child as being born during the marriage. To not recognize the presumption would violate the mandate of the civil union law.

In the context of a child born to a marriage where at least one party requests the court to determine custody and support issues in conjunction with the divorce action, it is incumbent upon the party either denying his or her own status as a parent, or in attempting to deny the parental interest of the other spouse, to initiate that challenge. That is the benefit of the presumption. Thus, it is not necessary that there be a corresponding parentage action every time the court is asked to determine parental rights and responsibilities with regard to a child born of a marriage. When parentage is not challenged, the result is that the parentage is determined by the nature of the proceedings as a matter of law. See Godin, 168 Vt. at 521. fn 2. In such a case, the court need only determine that the child was born during the marriage.

Lisa argues that Lawrence v. Limoge, 149 Vt. 569, 572-73 (1988), stands for the

proposition that this court lacks jurisdiction over the issue of parentage in this case. Lawrence involved an unmarried putative father seeking visitation rights based on the Uniform Child Custody Jurisdiction Act. The Court determined that the trial court lacked jurisdiction over the issue of parentage where the putative father brought the proceeding solely only the basis of the UCCJA, a statute intended to resolve jurisdictional disputes, and not under the Parentage Proceedings Act. Id. However, in this case, Janet is not simply a putative, or "alleged" parent, she is a presumed parent by virtue of the civil union. The court declines to stretch the holding in Lawrence to adopt Lisa's position that the issue of parentage is not implicit in a custody or child support action between parties to a marriage or a civil union involving a child born during the marriage or civil union.

Lisa next argues that the presumption must be deemed inapplicable based on the facts of this case because it is undisputed that there is no biological connection between Janet and IMJ. This argument depends on a narrow interpretation of Vermont's statute on parentage proceedings. Under Lisa's interpretation, once she established that Janet has no biological connection to IMJ, has not adopted IMJ, and has not completed

a "Voluntary Acknowledgment of Parentage form," FN 3 under 15 V.S.A. § 308 there can be no presumption of parentage. The court does not construe the statute to delineate the only ways in which one can be a parent under Vermont law, nor to dictate that the legal presumption can be defeated by genetics alone. See Godin, 168 Vt. at 522 ("Indeed, the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to the 'biology' of the presumed parent have become more common.").

Parties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife who, unable to conceive a child biologically, choose to conceive a child by inseminating the wife with the sperm of an anonymous donor. The issue of parental status of a child conceived through artificial insemination is one of first impression in Vermont. Under Lisa's interpretation of the law, because there is no established precedent in Vermont, the husband would no more than a mere stepparent and would be required to adopt the child so conceived in order to be considered a parent in the eyes of the law. This argument is without merit.

While Vermont has not yet been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination, the issue is not a new one in the common and statutory law of other states. See M. Yaworsky, Annotation, Rights and Obligations Resulting From Human Artificial Insemination, 83 A.L.R. 4th 295, 301 (1991) ("Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any Child born as a result of the insemination, for all purposes. Where this result is not dictated by statute it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel."). In In re Adoption of Anonymous, 345 N.Y.S.2d 430 (N.Y. Surr. Ct. 1973), for example, a mother asserted that her former husband's consent was not required for her new husband to adopt the child born of the previous marriage on the basis that the former husband was not a parent of the child conceived through artificial insemination. The court disagreed and required the former husband's consent, holding that a child born of artificial insemination of the mother by semen of anonymous third party donor with consent of her husband during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of

the same marriage, and that the husband is a lawful parent of the child. Id. At 435-36. See also People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968) (holding that ex-husband, who consented during the marriage to artificial insemination of his wife with sperm of anonymous sperm donor, was the lawful father of the child thereby conceived and responsible for support of the child). The Sorensen court reasoned that when a child born of a marriage is conceived by an anonymous sperm donor, there is no "natural" father, and the court can only look for a "lawful" father. Id. at 498

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relationship to be assumed and disclaimed at will, but the arrangement must be of such character as to impose

> an obligation of supporting those for whose existence he is directly responsible.

Id. at 499.

The court adopts the reasoning of other courts that have determined that where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology. As set forth in the facts above, both parties testified that they had the intent to create a family unit when they jointly agreed to the conception of IMJ.

While Lisa may be correct in her assertion that had Janet adopted IMJ this entire issue could have been averted, the question is not whether Janet could have adopted IMJ, but whether the law would require her to do so in order to protect her parental interest. As the legislative findings noted in Vermont's Civil Union Statute state:

> (7) The state has a strong interest in promoting stable and lasting

> families, including families based upon a same-sex couple.
>
> (8) Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.
>
> (9) Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for families together, just as do couples who are married under Vermont law.

Legislative Findings, 1999, No. 91 (Adj. Sess.) § 1 (eff. April 26, 2000). This court can not impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not impose this

obstacle upon a party to a civil union who makes that same choice. FN 4

Finally, we reach the question of whether Attorney Lashman's representations that parentage was not an issue and that Lisa "waived" the issue should be set aside and the temporary order vacated. Pursuant to the foregoing analysis, even if this court determines that Lisa should retain the right to challenge Janet's status as a parent, she has not demonstrated that there are any facts requiring judicial resolution that would or could destroy Janet's status as a lawful parent. FN5 The evidence presented at the hearing on this motion consisted of testimony of Lisa's and the various attorneys' understanding of the law, as opposed to any factual basis upon which to rebut the presumption of parentage. This court was justified in proceeding with a hearing already in progress on a temporary order to establish visitation based on the undisputed testimony in this case and the representations of both Lisa and her counsel that IMJ was a child of the civil union and that parentage was not an issue. Lisa has not raised any legal or factual argument that would lead this court to believe that if the issue of parentage were litigated prior to the temporary order that the outcome would be any different. The court is not persuaded

that there is any legal or factual basis to vacate the temporary order granting visitation rights to Janet.

ORDER

Based upon the above this court must recognize a legal parental interest in both parties to this civil union. Parentage by Lisa and Janet was presumed by Vermont law when this matter was filed. Given her own representations and testimony, Lisa has failed to demonstrate that there is any basis for a factual hearing to rebut that presumption. Accordingly, this court will recognize a parental interest in both Lisa and Janet. The temporary order remains in full force and this case is to be set for a final hearing on parental rights, property and child support. FN6

Dated at Rutland, Vermont, this 17th day of November, 2004.

s/William D. Cohen
Hon. William D. Cohen
Family Court Judge

FN1 The court will refer to the parties by

their first names for ease of identification and will identify the minor child only by initials.

FN2 The court has previously denied plaintiff's motion to require Janet and IMJ to submit to genetic testing. It has never been disputed that Janet has no "genetic" connection to the child. Plaintiff's motion was simply an extension of her legal argument that Janet cannot be considered a parent without a genetic connection.

FN3 See 15 V.S.A. § 307 (describing a procedure for unmarried parents to acknowledge parentage by filing a Voluntary Acknowledgment of Parent form with the department of health).

FN4 It is noteworthy that Vermont law requires the consent of a husband, or a party to a civil union, to any adoption of a child born during a marriage or civil union. See 15 V.S.A. § 2-401 (consent to adoption in Vermont requires consent by the woman who gave birth, the biological father, and "a man who is or has been married to the woman if the minor was born during the marriage"); 15 V.S.A. § 1204(b) (party to civil union included in any terms that denote the spousal relationship, as those terms are used

throughout the law.)

FN5 It bears notation that some states have recognized parental and visitation rights of a same-sex partner on the basis that the non-biological partner was a "de facto" parent where the couple utilized artificial insemination to have a family. See, e.g., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004). This court's decision is not based on Janet's status as a "de facto" parent, which, in jurisdictions that so recognize such status; typically focuses on the psychological and caretaking role that one has in the child's life. This court's analysis is based on Janet's status as a legal parent. See also Titchenal v. Dexter, 166 Vt. 373, 376 n.1 (1997) (distinguishing claims of "de facto" parent and "in loco parentis" as opposed to claim as a legal parent). This court's determination of parental status is based on Janet's role as a party to a civil union in the joint decision to conceive and raise the child during that union, not on her conduct subsequent to the child's birth.

FN6 As discussed in an earlier ruling in this case, the court is aware that Lisa initiated a parentage action in Virginia while the litigation initiated by her in this court was still pending. See Order, Sept. 2, 2004, at 5-6.

As discussed above, this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1301 et seq., Va. Code Ann. §§ 20-146.1 et seq. and the federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A(f). See Order, Sept. 2, 2004, at 5-6. Lisa has also recently filed an action seeking this court to recognize a final order issued by the Virginia court declaring her to be IMJ's sole legal parent and declaring Janet to have no claim of parentage or visitation rights over IMJ. That filing is waiting a response, and will be addressed at a separate time. However, the court notes the full, faith and credit requirement of the United States Constitution, U.S. Const. art. IV, § 1, only applies where the court issuing the judgment had jurisdiction to enter it. See Poston v. Poston, 160 Vt. 1, 5 (1993) (citing Williams v. North Carolina, 325 U.S. 226, 229 (1942)).